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In The

Supreme Court of the United States

THE OFFICE PLANNING GROUP, INC.,
Petitioners,

v.

BARAGA-HOUGHTON-KEWEENAW CHILD DEVELOPMENT BOARD, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI

James F. Tercha
Counsel of Record
Robert T. Daavettila
Tercha & Daavettila, PLLC
500 Shelden Avenue
Houghton, MI 49931
(906) 482-6310

Counsel for Petitioners

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QUESTION PRESENTED

Whether the Michigan Supreme Court erred in concluding that the Head Start Act does not contemplate a private cause of action to obtain disclosure of bid documents and that the United States Supreme Court has abandoned the four-part test established in Cort v. Ash, 422 U.S. 66 (1975) in favor of a completely textual analysis to establish an implied cause of action.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the Supreme Court of Michigan.

The petitioner here and appellee below is The Office Planning Group, Inc.

The respondent here and appellant below is Baraga-Houghton-Keweenaw Child Development Board, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Petitioner states as follows:

The Petitioner, The Office Planning Group, Inc., has no parent company and is not publicly traded.

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OPINIONS BELOW

The Opinion of the Michigan Supreme Court is reported at 472 Mich 479; 697 NW2d 871 and is reprinted in the Appendix to the Petition (Pet. App.) at 1-51. The Opinion of the Michigan Court of Appeals is reported at 259 Mich App 279; 674 NW2d 686, and is reprinted at Pet. App. 52-72. The Opinion of the Trial Court is reprinted at Pet. App. 73-78.

JURISDICTION

The Michigan Supreme Court entered its judgment on June 8, 2005. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves provisions of the Head Start Act, 42 U.S.C. § 9831, *et seq.*

STATEMENT OF THE CASE

This case concerns the refusal of the Respondent, Baraga-Houghton-Keweenaw Child Development Board, Inc. ("BHK"), an Head Start agency, to provide public inspection of bids solicited by BHK for the purchase of office equipment, in defiance of 42 U.S.C. § 9839(a), which requires all Head Start agencies to provide reasonable public access to books and records of an agency involving funds for which it is responsible.

The Petitioner, a participant in BHK's bidding process, requests review of the decision of the Michigan

Supreme Court, which held that no cause of action exists for the public to enforce the disclosure requirements of § 9839(a).

It is undisputed that BHK is a Head Start agency charged with the duty to provide reasonable public access to its books and records. It is also clear that BHK is a quasi-governmental agency that subsists entirely on the basis of federal and state government tax dollars and grants.

The refusal of the Michigan Supreme Court to enable a member of the public to enforce its right to inspect books and records of an Head Start agency is an extreme deviation from long-established precedent pertaining to implied causes of action. The decision refused to apply the analysis of *Cort v. Ash*, 422 U.S. 66 (1975), and essentially declared *Cort* a dead letter.

By its refusal to hold BHK to its statutory obligation or to allow the public to enforce its corresponding right to disclosure, the Michigan Supreme Court has permitted an agency charged with the administration of millions of tax dollars to conduct its operations without the public oversight intended by Congress in § 9839(a). Given the black letter law of § 9839(a), there is no justification for the lower court's opinion.

A. Factual Background

In January 2001, BHK, an Head Start agency located in the Upper Peninsula of Michigan, solicited bids from vendors of office furniture for a proposed office renovation at BHK's headquarters in Houghton, Michigan. The Petitioner, The Office Planning Group, Inc. ("OPG"), a local vendor of office furniture, was among the vendors who submitted bids in response to BHK's request.

On the morning of January 29, 2001, BHK's Building Committee was to review the bids and select a winning bidder. Although BHK claims that all bidders were notified that this meeting of the Building Committee was open to the public, OPG was not notified of its right to attend. No other vendor was in attendance at this meeting. Further, although BHK has claimed that the bidders were advised that the bids would be opened at the Building Committee meeting, the bids were instead opened by Rodney Liimatainen, the Executive Director of BHK, in advance of the Building Committee meeting.

Following the opening of bids and selection of a winning bidder, Mr. Liimatainen contacted Jack Hamm, OPG's agent, by telephone and informed him that OPG's bid was $10,000.00 high. Mr. Hamm, incredulous at the disparity between his bid and that of the purported low bidder, orally requested the opportunity to examine the bids of the other vendors to verify that he was bidding on the same items. Mr. Hamm's request was denied by Mr. Liimatainen. Mr. Hamm thereafter made two written requests for the bid

documents, which were likewise refused by Mr. Liimatainen.

B. Proceedings Below

In April 2001, OPG filed suit in the Houghton County Circuit Court, requesting issuance of an order requiring BHK to provide the bid documents. Additionally, OPG's counsel made several requests to officials within the Department of Health and Human Services (HHS) requesting the release of these bid documents, but all requests were refused. OPG requested help from its Congressman, Bart Stupak, in obtaining the bids, but Congressman Stupak's office was similarly unsuccessful in procuring access to the bid documents from HHS or BHK.

In discovery, OPG requested that BHK disclose any policy it may have concerning its obligation under 42 U.S.C. § 9839 to provide reasonable public access to books and records pertaining to funds for which it is responsible. BHK failed to identify any policy pertaining to the provision of public access to its books and records.

At the hearing on Defendant's Motion for Summary Disposition on October 15, 2002, Mr. Liimatainen twice acknowledged that members of the public should be entitled to look at the bid documents upon request, but retreated from that position after interjections from BHK's attorney. By its Order Following Consideration of Defendant's Motion for Summary Disposition dated November 7, 2002, the Houghton County Circuit Court ruled that the applicable federal statute, 42 U.S.C. § 9839(a), which

mandates that each Head Start agency provide "reasonable public access" to its books and records involving use of funds for which it is responsible, required BHK to provide copies of the desired bids to OPG subject to OPG's payment of reasonable costs to BHK for reproduction of the requested material. Pet.App. 73-78.

This ruling was unanimously affirmed by the Michigan Court of Appeals in its published opinion dated November 3, 200?, at 259 Mich App 279; 674 NW2d 686. Pet.App. 52-72. As part of its appeal, BHK argued that no private cause of action existed to enforce the disclosure provisions of § 9839(a). The Court of Appeals concluded that although Congress had not expressly provided a cause of action, an implied private cause of action existed to enforce the obligations of § 9839(a).

The Opinion of the Michigan Court of Appeals noted that two federal district courts had spoken to the issue of implied causes of action in other sections of the Head Start Act, finding in each case that no cause of action had been implied by the applicable statutory section. However, the existence of an implied private cause of action under § 9839(a) is an issue of first impression in Michigan and in the federal courts, as neither federal case addressed § 9839(a).

Granting leave to appeal, the Supreme Court of Michigan reversed the decision of the lower courts, by a 4-3 majority, holding that the Head Start Act does not contemplate a private cause of action seeking disclosure of contested bid documents under § 9839(a). The majority opinion contended that the *Cort v. Ash*

four-part inquiry had been abandoned by the United States Supreme Court in *Alexander v. Sandoval*, 532 US 275 (2001) in favor of "a completely textual analysis" in determining whether a cause of action can be implied from a statute.

The Court did not cite any precedent for its conclusion that the *Cort* inquiry had been discarded, nor did it acknowledge that the *Alexander* Court did not explore the *Cort* factors because the facts of *Alexander* did not call for extensive *Cort* inquiry. The majority also neglected to reference any post-*Alexander* opinion involving implied causes of action.

The Michigan Supreme Court ostensibly based its holding on textual analysis of § 9839(a), although no analysis of the text of the statute was actually done in the Court's opinion. Rather, the Court focused on the purposes of the Head Start Act, as well as the same two federal district court opinions addressed by the Michigan Court of Appeals, neither of which case is relevant to the existence of an implied private cause of action under § 9839(a). The *Cort* factors were ignored.

The Court's holding relied heavily on *Hodder v. Schoharie Co Child Dev Council, Inc*, 1995 US Dist Lexis 19049 (ND NY 1995) and *Johnson v. Quin Rivers Agency for Community Action, Inc*, 128 F Supp 2d 332 (ED Va, 2001), two district court cases involving separate statutory sections of the Head Start Act, neither of which concerned § 9839(a) or the rights explicitly granted to the public therein.[1] Unlike the present case,

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[1] *Hodder* involved termination claims by employees of a Head Start agency. It was concerned strictly with 42 USC 9849(b). *Johnson*

neither *Hodder* nor *Johnson* concerned statutory language within the Head Start Act which specifically grants the public a right to access books and records of a Head Start agency.

The majority went on to analyze the general purpose of the Head Start Act, though presumably not as a *Cort* factor. Borrowing the analysis of *Hodder*, the Court stated that the exclusive purpose of the Act is to "promote school readiness by providing services to low-income children and their families." Based on that strict purpose, the Court concluded that the only beneficiaries of the Head Start Act were the children and families identified in 42 USC § 9831. Thus, despite the express congressional grant of power to the public in § 9839(a), the Court granted non-beneficiary status to the public and reduced the public's explicit right to access Head Start books and records to zero.

Finally, the majority referenced a "comprehensive mechanism for ensuring agency compliance with its provisions", to wit: an enforcement proceeding by the Secretary of the HHS under 42 USC § 9836a and "the possible termination of Head Start agency status." However, the Court did not address the fact that BHK has no policy provisions with respect to disclosure of books and records and that representatives of the HHS have been complicit with BHK in the denial of the public's access to books and records of the agency, in contravention of the statute.

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involved claims of gender discrimination and violation of federal Head Start regulations. It was concerned with 42 USC9836a(a)(1) and (2).

In addition, it was irrelevant to the Court that the enforcement proceedings referred to did not expressly include the public's right to access books and records of a Head Start agency. No distinction was made by the Court between the public's express right to access and the agency performance standards capable of enforcement by the HHS.

The Opinion of the Michigan Supreme Court rendered nugatory the rights-granting language of 42 USC § 9839(a) and essentially immunized Head Start agencies from their obligation to provide reasonable public access to their books and records.

REASONS FOR GRANTING THE PETITION

This case presents a significant issue of federal law, which has not been, but should be settled by this Court: Whether the Head Start Act, specifically 42 USC § 9839(a), contemplates a private cause of action to obtain disclosure of bid documents and whether this Court has abandoned the four-part *Cort* test in favor of a completely textual analysis to establish an implied cause of action.

The Michigan Supreme Court has decided the question in a way that conflicts with previous decisions of this Court and has permitted BHK, an organization charged with administration of a federal program and completely funded by federal and state tax revenues, to avoid its statutory obligation to disclose information to the public. The danger associated with allowing a quasi-governmental agency carte blanche with federal

and state tax dollars is obvious. Congress clearly recognized this risk and granted the public a right to inspect the books and records of all Head Start agencies to ensure that the Head Start program is run effectively and efficiently, another purpose of the Head Start Act elucidated in § 9839(a), but ignored by the Michigan Supreme Court.

I. THIS COURT HAS NOT YET DECIDED WHETHER THERE IS AN IMPLIED CAUSE OF ACTION ARISING FROM § 9839(a) OF THE HEAD START ACT TO ENFORCE THE PUBLIC'S RIGHT TO ACCESS BOOKS AND RECORDS OF A HEAD START AGENCY.

The federal statute involved here, 42 USC § 9839(a), in pertinent part reads as follows:

> Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter [42 USC 9831 *et seq.*] and the objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. *Each agency shall also provide for reasonable public access to information, including public hearings*

> *at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.* 42 USC § 9839(a) [*emphasis added*].

There is a vital need for this Court to clarify whether Congress intended to provide the public with an ability to enforce their right to reasonable access to books and records of a Head Start agency. It is critical that this Court make clear to the lower courts that the *Cort* test has not been abandoned as suggested. By ignoring the principles of *Cort*, the Michigan Supreme Court deprived the public of a right specifically provided to it by Congress and has upset a thirty-year old standard for ascertaining the existence of private causes of action. In its place, the lower court has set down a hollow rule of "textual analysis", which even it did not follow.

A. The *Cort* standard for determining implied causes of action is long established as the criteria through which congressional intent is discerned.

The Petitioner agrees that the text of a particular statute is the proper method for discerning Congressional intent to provide a cause of action. As established by *Cannon v. University of Chicago*, 441 US 677 (1979), the question of the existence of a statutory cause of action is one of statutory construction. Any interpretation of a statute must begin with the language of the statute itself. *Id.*, at 689.

However, contrary to the suggestion of the Michigan Supreme Court, the four factors specified in *Cort* remain the "criteria though which this intent could be discerned." *California v. Sierra Club*, 451 US 287, 293 (1981)(citing *Davis v. Passman*, 442 US 228, 241 (1979)). There have been no cases since *Cort* that suggest the *Cort* factors are no longer relevant, and certainly there has been no case which declared *Cort* a dead letter.

The case cited by the lower court, *Alexander v. Sandoval, supra*, cannot be reasonably be interpreted as declaring the death of the *Cort* test. *Alexander* involved § 602 of Title VI of the Civil rights Act of 1964, and its grant of power to federal agencies to issue regulations. Section 602 neither conferred rights on private parties, nor proscribed conduct as unlawful. Rather, it granted power to governmental agencies to enforce regulations, similar to the Head Start statute at issue in *Johnson, supra*. It was unnecessary for the Court to delve into the *Cort* factors because it was clear from the statute that Congress did not intend to create a private cause of action. *Alexander* is bereft of language supporting the lower court's opinion that the *Cort* test has been abandoned in favor of a purely textual approach.

That *Alexander* does not support the extinction of the *Cort* test is verified not only by the language of *Alexander*, but also by subsequent cases. In *Jackson v. Birmingham Board of Education*[2], the Court clarified its holding in *Alexander*, stating that no private cause of action existed because the disparate-impact regulations did not merely apply § 601; the regulations, in fact,

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[2] ___ U.S. ___; 125 S Ct 1497; L Ed 2d 361 (2005)

forbade conduct allowed under § 601, making it clear that a private cause of action to enforce § 601 did not include a private right to enforce the regulations. *Jackson* made it apparent that it had not been necessary for the *Alexander* Court to reach the *Cort* factors in its decision because Congressional intent had been clear. Neither *Jackson* nor *Alexander* held or suggested that the *Cort* analysis had been abandoned in favor of a purely textual approach. Presumably, the statute at issue here, 42 USC § 9839, deserves to be properly analyzed under the prevailing legal framework to determine whether Congress did intend to provide a cause of action to the public for enforcement of its right to information under the Head Start Act. If this is not accomplished by the High Court, then the public has been afforded a right with no means to obtain a remedy for its deprivation.

B. Application of the *Cort* factors show a clear Congressional intent to provide the public with access to the courts to enforce its right to inspect books and records of Head Start agencies.

Although the majority opinion of the lower court chose not to apply the *Cort* factors to § 9839, Justice Kelly's dissent specifically analyzed the statutory section in light of *Cort* and found that a private cause of action indeed had been intended by Congress. Finding that the language of § 9839 did not expressly provide for, nor contradict the existence of, a private cause of action, Justice Kelly appropriately reviewed the statute under the four-part test.

The Cort analysis commences with the threshold question of whether the plaintiff is in the class for whose benefit Congress enacted the statute. *Cannon*,

supra, at 689. Reviewing the language of § 9839, it is obvious that Congress intended to grant access to the books and records of Head Start agencies to the public. The specific language of the statute requires all Head Start agencies to provide reasonable public access to its books and records. The petitioner is a member of the public. Thus, the petitioner is within the class for whom § 9839 was enacted.

As previously noted, the lower court found that the petitioner was not in the class of those beneficiaries for whom the statute was enacted. There can be no argument but that the Head Start Act was enacted for the purpose of providing services to low-income children and their families. However, limiting those benefited by the statute to low-income children and their families ignores the express grant of rights to the public in § 9839. The public was clearly an intended beneficiary of statute § 9839. That particular statutory section was enacted for the purpose of providing the public with the means to verify the honest application of its tax monies. Congress explicitly expressed the public's proprietary interest in the books and records of an agency such as BHK in § 9839. For the lower court to state that the petitioner is not within a class benefited by the Head Start Act is to disregard completely the very text that they hold in high esteem.

The lower court further relied on *Alexander*, supra, and *Touche Ross v. Redington*[3] for its conclusion that the petitioner was not within a class benefited by the statute. However, unlike the statutes in those cases,

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[3] 442 U.S. 560 (1979)

§ 9839 specifically confers a right on a member of the public to carry out inspections of books and records of Head Start agencies. As noted in Justice Kelly's dissent, the opposite situation existed in *Touche Ross* and *Alexander*. Neither statute created any rights in an individual or the general public. Those cases are not pertinent to the distinct issue of whether the Head Start Act creates private rights of access to Head Start records and whether the public is provided with a cause of action to enforce its rights.

The second analysis conducted under *Cort* review is whether there is any indication of legislative intent, explicit or implicit, either to create a private cause of action or to deny one. *Cort*, at 78. Outside of the explicit language of the statute granting the right of public access, neither OPG, BHK, nor the lower courts have been able to develop any legislative history contradicting the Congressional intent to provide a private cause of action under § 9839. The Court has previously recognized that

> "the legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling.'"[4]

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[4] Cannon v. University of Chicago, 441 US 677, 694 (1979)(citing Cort v. Ash, 422 US at 82)

Thus, in a case such as the present, the lack of legislative history supporting or denying a private cause of action does not serve as an impediment to a member of the public seeking to enforce its rights in the court system. The lower court, in its conclusion that the *Cort* test is no longer appropriate, totally failed to address the issue of legislative history at all.

The third factor under the Cort analysis is whether the implication of a private cause of action is consistent with the "underlying *purposes* of the legislative scheme". *Cort*, at 78 (*emphasis added*). The language of the *Cort* text is critical in this regard. Contrary to the holding of the lower court, the *Cort* test recognizes that statutory schemes may have more than one purpose. The majority opinion below recognized only one purpose: to promote school readiness for low-income children. While this is no doubt the focus of the Head Start Act, Congress also mandated that the program be managed effectively and efficiently. These are listed as express objectives of the program within § 9839. To effectuate this objective, Congress provided the public with a right to reasonable access to books and records of all agencies charged with administration of the Head Start program. Head Start's open accountability to the public is unmistakably Congress' attempt to ensure that the program runs efficiently and without significant waste of tax dollars.

If no private cause of action exists to enforce the public's right to an agency's books and records, no accountability to the public exists. Despite the claim of the lower court, the "comprehensive mechanism" of HHS enforcement is an empty promise to the public if no efforts are taken by that Department to enforce the

public's rights. This failure on the part of the HHS has already been borne out by the HHS's repeated refusal to provide the requested information to the Petitioner. In fact, in several communications to Petitioner and Petitioner's Congressman, the HHS *supported* BHK's refusal to provide access to books and records of the agency and has thus far refused to undertake any enforcement efforts.

It is also evident from the language and tenor of 42 US § 9836a, the statutory section providing HHS enforcement proceedings, as well as its interpretation in *Johnson*, supra, that the intent of § 9836a is to provide the Secretary with a method to enforce the Department's rights and performance standards, not the public's rights to disclosure under § 9839. BHK has not acknowledged that it even has any standards when it comes to disclosure of books and records. It is immediately apparent that the Secretary has no true incentive to provide the public with access to its agencies' books and records. This is clearly not what Congress had in mind in providing the public with the rights in § 9839.

The remedy sought by the Petitioner, to wit, disclosure of bid documents, would aid the congressional goal of providing government accountability to the public and as a result, aid in the objective of providing services to low-income children and their families efficiently and effectively. The lower court's denial of the public's private cause of action effectively hands Head Start agencies free rein over their allotted tax dollars without the benefit of sunlight for the public. This is a dangerous proposition for any government entity.

Finally, the *Cort* test asks whether the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law. *Cort*, at 78. The cause of action sought by the Petitioner in this case arises under a federal statute and is not traditionally relegated to state law. In fact, no such remedy at state law exists. Therefore, the cause of action sought by Petitioner here is not and should not be precluded by a state remedy.

The Petitioner is not making a request for anything beyond what § 9839(a) provides: reasonable public access to books and records of a Head Start agency. There is no request for an enlarged scope of the cause of action. To do so would be to expand the statute beyond "reasonable public access" and would be inconsistent with the clear text of the statute. The Petitioner is simply requesting the ability to enforce its right to know what its government does with its tax dollars. As stated in *Franklin v. Gwinnett County Pub. Schs*[5], "where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded." The lower court has denied that principle and enabled BHK to intentionally violate the right of public oversight for its expenditures of public funds.

II. REVIEW OF THE LOWER COURT'S OPINION IS VITALLY IMPORTANT.

The state of the law of implied causes of action has been severally obscured by the opinion of the lower court. Without justification, the Michigan Supreme

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[5] 503 U.S. 60 (1992)(citing 3 W. Blackstone, Commentaries 23 (1783))

Court has spoken for the United States Supreme Court concerning the relevance of the *Cort v. Ash* test, and in so doing, has crippled the right of the public to shed light on the activities of their government, a fundamental right of the citizenry.

There is no legitimate justification for the lower court's opinion, nor has the lower court provided a workable alternative rule. In fact, after stating that this Court abandoned the *Cort* test in favor of a "completely textual analysis", the lower court failed to review the text of the relevant statute at all. Leaving the lower court's decision intact not only eliminates a vital right expressly conveyed to the public by Congress, but also muddies the waters for future litigants seeking to ascertain whether a private cause of action exists.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

James F. Tercha
Counsel of Record
Robert T. Daavettila
Tercha & Daavettila, PLLC
500 Shelden Avenue
Houghton, MI 49931
(906) 482-6310

Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd
472 Mich 479, 697 NW2d 871

Argued November 10, 2004
Decided June 8, 2005
Calendar No. 6
Docket No(s) 125448.
Lower Court Citation(s) 259 Mich App 279 (2003).
Disposition: Reversed.

Counsel:
Tercha & Daavettila, PLLC (by *Robert T. Daavettila*), for the plaintiff. [Houghton, MI]

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Marcia L. Howe*), for the defendant. [Farmington Hills, MI]

Judges:
Before: Chief Justice Clifford W. Taylor. Justices Michael F. Cavanagh, Elizabeth A. Weaver, Marilyn Kelly, Maura D. Corrigan, Robert P. Young, Jr., Stephen J. Markman

[Page 480] [Page 481]
Young, J.

Plaintiff is a disappointed bidder that seeks disclosure from defendant of bid documents under 42 USC 9839(a), a provision of the federal Head Start Act[1]

[1] 42 USC 9831 *et seq.*

[Page 482] that requires Head Start agencies to provide for "reasonable public access" to information. Defendant Head Start agency contends that the act does not create a private cause of action to enforce its provisions. We hold that the Head Start Act does not contemplate a private cause of action seeking disclosure of the contested bid documents under § 9839(a). Accordingly, we reverse the judgment of the Court of Appeals and enter judgment in favor of defendant.

I. FACTS AND PROCEDURAL HISTORY

Defendant, Baraga-Houghton-Keweenaw Child Development Board, Inc., is a private, nonprofit organization that is designated as a Head Start[2] agency under 42 USC 9836(a).[3] Defendant operates Head Start programs in Baraga, Houghton, and Keweenaw counties. In January 2001, defendant solicited bids for office supplies and furniture. Plaintiff, a private, for-

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[2] See section III(A) of this opinion.

[3] 42 USC 9836(a) provides:

> The Secretary [of Health and Human Services] is authorized to designate as a Head Start agency any local public or private nonprofit or for-profit agency, within a community, which (1) has the power and authority to carry out the purposes of this subchapter [42 USC 9831 *et seq.*,] and perform the functions set forth in section 642 [42 USC 9837] within a community; and (2) is determined by the Secretary (in consultation with the chief executive officer of the State involved, if such State expends non-Federal funds to carry out Head Start programs) to be capable of planning, conducting, administering, and evaluating, either directly or by other arrangements, a Head Start program.

profit corporation, submitted a bid. Defendant conducted an open meeting at which its building committee reviewed the bids and made a recommendation to its board of directors. Defendant accepted the lowest bid at the open meeting. Rodney Liimatainen, defendant's executive director, [Page 483] notified plaintiff's branch manager, Jack Hamm, that plaintiff's bid had exceeded the lowest bid by $10,000.

Hamm, suspicious that the lower bidders had offered lesser-quality merchandise, requested copies of all the bids submitted. Liimatainen informed Hamm that the details of the bids were unavailable for inspection by the public because the other bidders did not want the information disseminated. Liimatainen acknowledged, however, that there might be small discrepancies in quality, manufacturer, and type of product among the bids submitted. In an attempt to compel defendant to disclose copies of the bids, Hamm then submitted written requests to defendant under the Michigan Freedom of Information Act (FOIA).[4] Defendant refused the requests on the basis that it was a private corporation that was not subject to the FOIA. Plaintiff also requested copies of the submitted bids from the Department of Health and Human Services (HHS), the federal agency responsible for administering the Head Start Act.

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[4] MCL 15.231 et seq.

In April 2001, plaintiff filed an action under the FOIA[5] demanding a complete copy of each bid. Plaintiff later filed an amended complaint alleging that it was additionally entitled to disclosure of the bid information under unspecified "federal legislation which requires disclosure of information by parties supplying service under the so-called Head Start Program." In subsequent motion papers, plaintiff indicated that the federal legislation on which it relied was 42 USC 9839(a), which provides, in relevant part:

[Page 484]

Each [Head Start] agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.

After the commencement of the litigation, various HHS officials issued memoranda indicating that defendant was not required under the FOIA or the Head Start Act to provide plaintiff with access to the bid information. In a letter to defendant, a program officer in the Chicago regional office of the HHS advised defendant that Head Start grantees are not subject to the FOIA provisions. The program officer

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[5] Although the trial court treated plaintiff's complaint as if it contained a claim under the federal Freedom of Information Act, 5 USC 551 *et seq.*, the parties agree that plaintiff's claim was based solely on the Michigan FOIA.

further noted that, under § 9839(a) and its corresponding HHS regulation, 45 CFR 1301.30[6], defendant was not required to disclose specific information regarding the selection of a supplier; rather, it was required only to disclose general information such as copies of its written procurement procedures.

Similarly, in a letter to plaintiff's counsel, the director of the HHS Office of Public Affairs, FOI/Privacy Acts Division, stated that the FOIA did not apply to defendant; however, the director noted that defendant had provided plaintiff with a copy of the policy it followed in conducting its procurement activities and with background documents addressing its source of funding.

[Page 485]

The director also wrote a letter advising defense counsel that defendant was not subject to the requirements of the federal Freedom of Information Act.[7] The director further advised counsel that defendant was bound by any provisions incorporated into the grant language regarding its obligations to

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[6] 45 CFR 1301.30 provides:

Head Start agencies and delegate agencies shall conduct the Head Start program in an effective and efficient manner, free of political bias or family favoritism. *Each agency shall also provide reasonable public access to information and to the agency's records pertaining to the Head Start program.* [Emphasis supplied.]

[7] 5 USC 551 *et seq.*.

make information concerning its activities available to the public, but that defendant had already complied with those requirements.

Finally, in a letter written to Congressman Bart Stupak, who had apparently come to plaintiff's aid in seeking the bid documents, the director of the HHS Office of Family and Child Development stated that defendant had reasonably complied with the requirements of § 9839 and 45 CFR 1301.30 by providing plaintiff with a copy of its procurement procedures, and that defendant was under no further obligation to provide documents with specific commercial information it received through the competitive bid process.

Citing these HHS memoranda, defendant moved for summary disposition, arguing that it was not subject to the Michigan FOIA or the federal FOIA and that defendant had exceeded any obligation it had to supply plaintiff with information under 42 USC 9839(a).

The trial court granted defendant's motion for summary disposition to the extent that plaintiff sought relief under the Michigan FOIA and the federal FOIA.[8] The court, however, sua sponte granted summary disposition in favor of plaintiff under MCR 2.116(I)(2) on the ground that the requested information was subject to disclosure under § 9839(a). The court,

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[8] See note 5. Plaintiff's FOIA claims are not at issue in this appeal.

observing that § 9839(a) required that a Head Start agency grant [Page 486] "reasonable public access" to its books and records, opined that

> [a] demand that information be provided outside of working hours would not be reasonable. A demand that an agency exhaustively search for something that the requesting party cannot properly identify would not be reasonable. As recognized by the Michigan Freedom of Information Act, it would likely not be reasonable to expect an agency to create a record, such as a compilation or summary, when no such record exists. And it may well not be reasonable to demand that an employee's personnel file or disciplinary record be disclosed.

In the present situation, a denial by the Plaintiff of a written request to review specified, existing and readily accessible written bids is certainly not compliant with a requirement of providing reasonable public access. That would be true regardless of who made the request, but the case is even more compelling when the requesting party has a genuine, identifiable reason for the information sought, as did the Plaintiff.

In summary, Defendant's denial of Plaintiff's request to review and obtain copies of the bids in question was in violation of the Federal requirement that Plaintiff provide for reasonable public access to information, including reasonable public access to books and records of the agency, involving the use of funds for which the Plaintiff is responsible.

The Court of Appeals affirmed.[9] Noting that the state courts shared concurrent jurisdiction to decide a case involving the Head Start Act because the act did not provide for exclusive federal jurisdiction[10], the panel rejected the reasoning of federal case law holding that the Head Start Act does not provide a private cause of [Page 487] action[11]. The panel, citing *Long v Chelsea Community Hosp*, 219 Mich App 578; 557 NW2d 157 (1996), and *Forster v Delton School Dist*, 176 Mich App 582, 585; 440 NW2d 421 (1989), held that a private cause of action could be *inferred* under § 9839(a) because the statute did not provide adequate means to enforce its provisions:

> The statute in question, 42 USC 9839(a), requires Head Start agencies to provide reasonable public access to their books and records, but it does not provide any means of enforcing this specific provision. Although the Head Start Act requires agencies to open their books and records to the department secretary or the United States Comptroller General for audit and examination, 42 USC 9842, Congress

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[9] *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 259 Mich App 279; 674 NW2d 686 (2003).

[10] *Gulf Offshore Co v Mobil Oil Corp*, 453 US 473, 478; 101 S Ct 2870; 69 L Ed 2d 784 (1981).

[11] See *Johnson v Quin Rivers Agency for Community Action, Inc*, 128 F Supp 2d 332, 336 (ED Va, 2001); *Hodder v Schoharie Co Child Dev Council, Inc*, 1995 US Dist LEXIS 19049 (ND NY, 1995).

> specifically provided for public access to the books and records, not simply to the audits prepared by these other entities. Therefore, we conclude an implied private cause of action exists.[12]

The panel concluded that the trial court did not err in granting summary disposition for plaintiff because defendant had not complied with the "reasonable public access" requirement of § 9839(a). The panel, noting that defendant had failed to suggest why it would be *unreasonable* to disclose the requested information, held that because the information was readily available and could be produced on short notice, it was covered by the statutory directive to provide "reasonable public access."[13] The panel rejected defendant's contention that the bidders did not have notice that the bids would be disclosed, stating that the statute itself provided that notice; the panel also rejected defendant's argument [Page 488] that public policy dictated against interpreting the statute to require disclosure of the bids.[14] Finally, the panel held that it was not required to defer to the interpretation of § 9839(a) set forth in the letters written by HHS officials, opining that only a ruling from the "upper echelon" of the HHS would be entitled to deference and that, in any event, the officials' interpretation was clearly wrong.[15]

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[12] 259 Mich App at 289-290 (emphasis deleted).
[13] 259 Mich App at 290-292.
[14] 259 Mich App at 292-295.
[15] 259 Mich App at 297.

We granted defendant's application for leave to appeal.[16] Because we conclude that § 9839(a) does not provide for a private cause of action, we reverse the judgment of the Court of Appeals and enter judgment in favor of defendant.

II. STANDARD OF REVIEW

This case presents issues of statutory construction and other questions of law. Such questions are subject to review de novo by this Court.[17] Similarly, we review a trial court's grant of summary disposition de novo.[18]

III. ANALYSIS

A. INTRODUCTION

The Head Start Act was enacted for the purpose of "promot[ing] school readiness by enhancing the social and cognitive development of low-income children through the provision, to low-income children and their [Page 489] families, of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be

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[16] 470 Mich 888 (2004).

[17] *Preserve the Dunes, Inc v Dep't of Environmental Quality*, 471 Mich 508, 513; 684 NW2d 847 (2004); *Mack v Detroit*, 467 Mich 186, 193; 649 NW2d 47 (2002); *Grand Traverse Co v Michigan*, 450 Mich 457, 463-464; 538 NW2d 1 (1995).

[18] *Mack, supra* at 193.

necessary."[19] The secretary of the HHS is authorized under 42 USC 9836(a) to designate as a Head Start agency "any local public or private nonprofit or for-profit agency . . . ." The act further authorizes the secretary to provide financial assistance or grants to Head Start agencies for the operation of Head Start programs.[20]

Under 42 USC 9836a, the secretary is directed to establish by regulation standards applicable to Head Start agencies, including performance standards, administrative and financial management standards, and standards relating to the conditions and location of agency facilities. The secretary has promulgated regulations implementing these statutory directives.[21] The secretary is directed under 42 USC 9836a(c) and (d) to monitor Head Start agencies for compliance with statutory and regulatory standards and to take corrective action if necessary. If an agency does not comply with such standards, the secretary may initiate proceedings to terminate the designation of the agency unless the agency corrects the deficiency.[22]

At issue in this case is § 9839(a) of the act, which provides as follows:

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[19] 42 USC 9831; see also *Action for Boston Community Dev, Inc v Shalala*, 136 F3d 29, 30 (CA 1, 1998).

[20] 42 USC 9833 to 9835; *Community Action of Laramie Co, Inc v Bowen*, 866 F2d 347, 348 (CA 10, 1989).

[21] See 45 CFR 1304.1.

[22] 42 USC 9836a(d)(1)(C).

Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the [Page 490] purposes of this subchapter [42 USC 9831 *et seq.*] and the objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. *Each agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.* Each such agency shall adopt for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to (1) establish specific standards governing salaries, salary increases, travel and per diem allowances, and other employee benefits; (2) assure that only persons capable of discharging their duties with competence and integrity are employed and that employees are promoted or advanced under impartial procedures calculated to improve agency performance and effectiveness; (3) guard against personal or financial conflicts of interest; and (4) define employee duties in an appropriate manner which will in any case preclude employees from participating, in connection with the performance of their duties, in any form of picketing, protest, or other direct action which is in violation of law. [Emphasis supplied.]

Similarly, Head Start regulation 45 CFR 1301.30 provides that "[e]ach agency shall also provide reasonable public access to information and to the agency's records pertaining to the Head Start program."

The lower courts concluded that defendant was required under the "reasonable public access" provision of § 9839(a) to disclose copies of all bids it received in connection with its January 2001 solicitation of bids for office supplies and furniture. In considering the propriety of the lower courts' rulings, we must first determine [Page 491] whether the trial court properly exercised jurisdiction over plaintiff's claim under § 9839(a). Next, we must examine whether § 9839(a) allows for plaintiff's private cause of action to enforce the disclosure provision. Although we conclude that the state courts have jurisdiction over this action, we hold that § 9839(a) does not provide for a private cause of action.

B. CONCURRENT JURISDICTION

Defendant first argues that the state courts lack jurisdiction over plaintiff's claim under the federal Head Start Act.[23] We disagree and hold that the state

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[23] We note initially that defendant, in support of its assertion that subject-matter jurisdiction is lacking, presents a hodgepodge, "shotgun approach" argument that conflates the concepts of exhaustion of remedies, primary jurisdiction, "*Chevron* doctrine" deference, and existence of a private cause of action under the federal statute at issue, making it rather difficult to discern what precisely it is that defendant is arguing. These concepts are not, in fact, jurisdictional in nature. See, e.g., *Northwest Airlines, Inc v Kent Co, Michigan*, 510 US 355, 365; 114 S Ct 855; 127 L Ed 2d 183 (1994) ("The question whether a federal statute creates a claim for relief is not jurisdictional.").

In light of our determination that the Head Start Act, in the first instance, does not provide for a private cause of action to enforce the public access requirement of § 9839(a), it is unnecessary to address defendant's assertion that primary jurisdiction over this cause of action lies with the HHS, see *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001), and its related argument that plaintiff failed to exhaust administrative remedies before filing this state-court action. However, we note that this case presents a straightforward issue of statutory construction involving the meaning of the simple phrase "reasonable public access." The interpretation of this particular statutory language does not require knowledge of sophisticated or technical terms or the exercise of expert judgment or discretion. Because the "reasonable public access" provision presents a matter that the judiciary is particularly competent to address, rather than a matter within the "specialized and expert knowledge" of the HHS, see *id.* at 198, primary jurisdiction does not lie with that agency. Moreover, there are no "prescribed administrative remedies" that plaintiff has failed to exhaust before seeking relief under § 9839(a) from the courts. *McCarthy v Madigan*, 503 US 140, 144-145; 112 S Ct 1081; 117 L Ed 2d 291 (1992).

Defendant's somewhat cryptic assertion that the state courts are required to give deference to the HHS's interpretation of § 9839(a) warrants additional comment. Citing the "*Chevron* doctrine," see *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984), defendant argues that the state courts are required to give deference to the determinations of HHS officials regarding the disclosure required under the act and that the state courts therefore lack jurisdiction over this action. Again, defendant is conflating two discrete doctrines. The concept of *Chevron* deference is not jurisdictional; rather, it is a doctrine that is in the nature of a *standard of review*, applied by the judiciary in reviewing an agency's reasonable construction of an ambiguous statute, which recognizes that any necessary policy determinations in interpreting a federal statute are more properly left to the agency responsible for administering the particular statute. See *Yellow Transportation, Inc v Michigan*, 537 US 36, 47-48; 123 S Ct 371; 154 L Ed 2d 377 (2002); *United States v Mead Corp*, 533 US 218, 227-228; 121 S Ct 2164; 150 L Ed 2d 292 (2001), quoting *Chevron*, *supra* at 844 ("'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer'").

Again, because we have determined that there is no private cause of action to enforce the disclosure requirement of the Head Start Act, we need not address whether the state courts are required, under *Chevron* and *Mead*, *supra*, to accord deference to the letters authored by these HHS

courts have concurrent jurisdiction with the federal [Page 492] courts to entertain plaintiff's action seeking relief under § 9839(a).

[Page 493]

It has long been established that, so long as Congress has not provided for exclusive federal-court jurisdiction, state courts may exercise subject-matter jurisdiction over federal-law claims "'whenever, by their own constitution, they are competent to take it.'"[24] State courts possess sovereignty concurrent with that of the federal government, "subject only to limitations imposed by the Supremacy Clause."[25] Thus, state

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officials. However, we note in passing that these letters presumably lack the "force of law" that is generally required for application of *Chevron*-type deference. See, e.g., *Shalala v Guernsey Mem Hosp*, 514 US 87, 99; 115 S Ct 1232; 131 L Ed 2d 106 (1995) (noting that administrative interpretive rules, which do not require notice and comment, "do not have the force and effect of law and are not accorded that weight in the adjudicatory process"); *Northwest Airlines, supra* at 366-367 (noting that a "reasoned decision" of the Secretary of Transportation would be entitled to *Chevron*-type deference in a dispute over the meaning of a provision of the Anti-Head Tax Act, 49 USC 1513); *Human Development Corp of Metropolitan St Louis v United States Dep't of Health & Human Services*, 312 F3d 373, 379 (CA, 8, 2002) (applying *Chevron* deference to a final decision of the HHS's Departmental Appeals Board interpreting an HHS regulation); see also *Mead, supra* at 236, n 17; *Christensen v Harris Co*, 529 US 576, 586-587; 120 S Ct 1655; 146 L Ed 2d 621 (2000).

[24] *Tafflin v Levitt*, 493 US 455, 459; 110 S Ct 792; 107 L Ed 2d 887 (1990), quoting *Claflin v Houseman*, 93 US 130, 136; 23 L Ed 833 (1876).

[25] *Tafflin, supra* at 458. See US Const, art VI, cl 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

courts are presumptively competent to assume jurisdiction over a cause of action arising under federal law.[26] If concurrent jurisdiction otherwise exists, subject-matter jurisdiction over a federal-law claim is governed by state law.[27]

In determining whether our state courts enjoy concurrent jurisdiction over a claim brought under federal law, it is necessary to determine whether Congress intended to limit jurisdiction to the federal courts.

> "In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication [Page 494] from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests."[28]

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[26] *Tafflin, supra* at 459; *Gulf Offshore Co, supra* at 478; *Charles Dowd Box Co, Inc v Courtney*, 368 US 502, 507-508; 82 S Ct 519; 7 L Ed 2d 483 (1962).

[27] *Gulf Offshore Co, supra* at 478.

[28] *Tafflin, supra* at 459-460, quoting *Gulf Offshore Co, supra* at 478 (citations omitted); see also *Peden v Detroit*, 470 Mich 195, 201 n 4; 680 NW2d 857 (2004). Although we, of course, must apply these federal-law principles in

Defendant does not present a coherent argument that the courts of this state lack jurisdiction over the parties' dispute concerning the disclosure of documents under § 9839(a). Rather, defendant simply contends that the "expansive regulatory scheme" of the Head Start Act "evidences Congressional intent that the HHS exercise its sole discretion over its administration of local Head-Start agencies through its regulations." Defendant has conflated the vesting of discretion in federal agencies with the vesting of jurisdiction in the federal courts: That a particular agency has discretion to administer a federal statute and to implement regulations for the enforcement of the statute does not address whether state courts have concurrent jurisdiction over a dispute arising under that statute. Instead, our inquiry is limited to whether Congress intended to limit to federal courts exclusive jurisdiction over such a dispute and, if not, whether state law allows our courts to exercise subject-matter jurisdiction over the action.

Defendant concedes that nothing in the Head Start Act explicitly confines jurisdiction to the federal courts, and defendant does not point to any statutory indication that Congress intended that jurisdiction over a dispute under the Head Start Act should lie solely in the [Page 495] federal courts. We have been unable to

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determining whether concurrent jurisdiction exists under the federal statute, we would be remiss if we failed to note that the use of legislative history in the search for legislative intent "'is a perilous venture . . . [that is] doubly fraught with danger in Michigan which, unlike Congress, has failed to create an authoritative legislative record.'" *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 587 n 7 (2001), quoting *People v Tolbert*, 216 Mich App 353, 360 n 5; 549 NW2d 61 (1996).

locate anything in the legislative history of the act demonstrating an intent to grant exclusive federal-court jurisdiction, and defendant has certainly failed to bring any such information to our attention. Moreover, there is no "clear incompatibility" between state-court jurisdiction and federal interests with respect to application of the Head Start Act, particularly with respect to a straightforward question of statutory construction such as the one presented in this case. Indeed, as noted in *Gulf Offshore Co v Mobil Oil Corp*, 453 US 473, 478 n 4; 101 S Ct 2870; 69 L Ed 2d 784 (1981), "[p]ermitting state courts to entertain federal causes of action facilitates the enforcement of federal rights."

Congress has done nothing in the exercise of its powers under the Supremacy Clause to "affirmatively divest state courts of their presumptively concurrent jurisdiction" over claims brought under the Head Start Act.[29] Additionally, it is clear that the courts of this state have subject-matter jurisdiction over the dispute at issue, because our Constitution provides that the circuit courts of this state have original jurisdiction "in all matters not prohibited by law . . . ."[30] Accordingly, we hold that the courts of this state have properly exercised concurrent jurisdiction over plaintiff's § 9839(a) claim.

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[29] *Yellow Freight Sys, Inc v Donnelly*, 494 US 820, 823; 110 S Ct 1566; 108 L Ed 2d 834 (1990).

[30] Const 1963, art 6, § 13.

C. PRIVATE CAUSE OF ACTION TO ENFORCE § 9839(a)

Defendant next contends that plaintiff's claim fails because § 9839(a) does not provide for a private cause of action to enforce the public access requirement. We agree.

[Page 496]

1. WHETHER A CAUSE OF ACTION EXISTS IS SOLELY A MATTER OF STATUTORY CONSTRUCTION

"'[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.'"[31] Rather, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress."[32] Thus, in determining whether plaintiff may bring a private cause of action to enforce the public access requirement of § 9839(a), we must determine whether Congress intended to create such a cause of action.[33] Because the

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[31] *Touche Ross & Co v Redington*, 442 US 560, 568; 99 S Ct 2479; 61 L Ed 2d 82 (1979), quoting *Cannon v Univ of Chicago*, 441 US 677, 688; 99 S Ct 1946; 60 L Ed 2d 560 (1979).

[32] *Alexander v Sandoval*, 532 US 275, 286; 121 S Ct 1511; 149 L Ed 2d 517 (2001); see also *Touche Ross & Co, supra* at 578.

[33] *Alexander, supra* at 286-287.

Head Start Act does not evidence an intent to create a private remedy for an alleged violation of § 9839(a), plaintiff's action must be dismissed.

Although the United States Supreme Court in the last century embraced a short-lived willingness to create remedies to enforce private rights,[34] the Court [Page 497] "abandoned" that approach to statutory remedies in *Cort v Ash*[35] and "[has] not returned to it since."[36] In *Cort*, the Court set forth a test for determining whether a private remedy is implicit in a statute that does not expressly provide such a remedy:

First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to

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[34] See, e.g., *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971) (inferring a private cause of action for damages to enforce the Fourth Amendment guarantee against unreasonable searches and seizures); *J I Case Co v Borak*, 377 US 426, 433; 84 S Ct 1555; 12 L Ed 2d 423 (1964) (holding that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" of a federal statute). See also, generally, *Correctional Services Corp v Malesko*, 534 US 61, 75; 122 S Ct 515; 151 L Ed 2d 456 (2001) (Scalia, J., concurring) (noting that " *Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition"); Note, *Section 1983 and implied rights of action: Rights, remedies, and realism*, 90 Mich L R 1062, 1071-1083 (1992) (exploring the evolution of the United States Supreme Court's implied right of action jurisprudence and its subsequent retreat).

[35] 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 ((1975).

[36] *Alexander, supra* at 287.

deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?[37]

Post- *Cort*, the Court has become increasingly reluctant to imply a private cause of action, preferring to focus exclusively on the second *Cort* element, which requires indicia of congressional intent to create a cause of action. For example, as early as *Cannon v Univ of Chicago*,[38] although the Court applied each of the *Cort* factors, it characterized the determination whether a private remedy existed to enforce a statutory right as a matter of "statutory construction."[39] In *Touche Ross &*

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[37] *Cort, supra* at 78 (emphasis deleted).

[38] 441 US 677, 688; 99 S Ct 1946; 60 L Ed 2d 560 ((1979).

[39] See also *Merrell Dow Pharmaceuticals Inc v Thompson*, 478 US 804, 812; 106 S Ct 3229; 92 L Ed 2d 650 (1986), noting that it would "flout congressional intent to provide a private federal remedy" for an alleged violation of the federal Food, Drug, and Cosmetic Act, 21 USC 301 *et seq.*:

See, *e.g.*, *Daily Income Fund, Inc. v. Fox*, 464 US 523, 535-536 ((1984) ("In evaluating such a claim, our focus must be on the intent of Congress when it enacted the statute in question."); *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U.S., at 13 ("The key to the inquiry is the intent of the Legislature."); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("Our focus, as it is in any case involving the implication of a right of action, is on the intent of Congress."); *California* v. *Sierra Club*, 451 U.S. at 293 ("[The] ultimate issue is whether Congress intended to create a private right of action."); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 91 (1981) ("The ultimate question in cases such as this is whether Congress intended to create the private remedy."); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979) ("The question whether a statute creates a cause of action, either expressly or by

Co[40], [Page 498] the Court declined to even address the remaining *Cort* factors where it was clear that Congress did not intend to create a private cause of action to enforce § 17(a) of the Securities Exchange Act of 1934[41]:

> It is true that in *Cort* v. *Ash*, the Court set forth four factors that it considered "relevant" in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S. at 78—are ones traditionally relied upon in determining legislative intent. Here, the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful. And

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implication, is basically a matter of statutory construction."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("The question of the existence of a statutory cause of action is, of course, one of statutory construction."). [*Merrell, supra* at 812 n 9.]

[40] Touche Ross & Co, supra at 575-576.

[41] 15 USC 78q(a).

> the parties as [Page 499] well as the Court of Appeals agree that the legislative history of the 1934 Act simply does not speak to the issue of private remedies under § 17 (a). At least in such a case as this, the inquiry ends there: The question whether Congress, either expressly or by implication, intended to create a private right of action, has been definitely answered in the negative.

Similarly, in *California v Sierra Club,*[42] the Court, noting that "the focus of the inquiry is on whether Congress intended to create a remedy," concluded that consideration of the first two *Cort* factors was dispositive. Because there was no indication that Congress intended to create a private remedy to enforce § 10 of the Rivers and Harbors Appropriation Act of 1899,[43] the Court held that it was unnecessary to inquire further into the remaining factors, because "[t]hese factors are only of relevance if the first two factors give indication of congressional intent to create the remedy."[44]

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[42] 451 US 287, 297; 101 S Ct 1775; 68 L Ed 2d 101 ((1981).

[43] 33 USC 403.

[44] *Sierra Club, supra* at 298.

This Court has also noted the paramount importance of legislative intent in determining whether a private cause of action can be founded on an alleged violation of a statute. See

In *Alexander,* the Court appears to have abandoned the *Cort* inquiry altogether in favor of a completely textual analysis in determining whether a private remedy exists under a particular statute. Rather than applying the *Cort* factors, the *Alexander* Court concluded, solely on the basis of the text of 42 USC 2000d-1, that private individuals could not sue to enforce disparate-impact regulations promulgated under Title VI of the Civil Rights Act of 1964. The Court [Page 500] rejected the plaintiff's argument that dispositive weight could be accorded to context shorn of text, holding that "legal context matters only to the extent it clarifies text."[45] The *Alexander* majority additionally rejected the dissent's claim that the position adopted "'blind[ed] itself to important evidence of congressional intent,'" noting that the methodology employed in the majority opinion was well established in earlier decisions that explained "that the interpretive inquiry begins with the text and structure of the statute . . . and ends once it has become clear that Congress did not provide a cause of action."[46]

Gardner v Wood, 429 Mich 290, 302 n 6; 414 NW2d 706 (1987) (noting that *Cort* marked "the beginning of a trend in the federal courts to reserve the creation of civil remedies from penal violations only where to do so [was] clearly consistent with affirmative legislative intent").

[45] Alexander, supra at 288.

[46] *Id.* at 288 n 7.

Our dissenting colleagues assert that we have incorrectly characterized *Touche Ross & Co* and *Alexander* as representing a departure from the four-factor *Cort* test. *Post* at 514-515. Whether the United States Supreme Court will, in the future, continue to apply the four-part *Cort* test is, however, simply irrelevant where it is clear from the text of the statute at issue that Congress did not intend to create a private enforcement action. Indeed,

2. THE HEAD START ACT DOES NOT PROVIDE FOR A PRIVATE CAUSE OF ACTION

With the aforementioned principles in mind, we examine the text of the Head Start Act to determine [Page 501] whether it provides for a private cause of action to enforce § 9839(a).

To date, two federal district courts have considered whether causes of action existed under different provisions of the Head Start Act. Although our Court of Appeals cited these cases, it rejected their analyses without explanation.

In *Hodder, supra,* the United States District Court for the Northern District of New York applied the *Cort* factors and concluded that the plaintiffs, former employees of a Head Start agency, could not bring a cause of action for wrongful discharge under the Head Start Act:

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this case is directly analogous to *Touche Ross & Co* and *Alexander*. As the dissent points out, the provisions at issue in *Touche Ross & Co* and *Alexander* neither conferred rights on individuals nor proscribed conduct as unlawful. The same can certainly be said of 42 USC 9839(a). Similarly, the dissent notes that the *Alexander* Court found it quite telling that the statute at issue expressly empowered governmental agencies to enforce regulations. The Head Start Act does *precisely* that, by directing the secretary to establish regulations governing Head Start agencies and to enforce those regulations, and, in 42 USC 9839(a), by requiring Head Start agencies to conduct program activities in conformity with the Head Start Act and to establish or adopt rules to carry out that duty.

We note, in passing, that Justice Weaver's separate dissent merely echoes the longer dissent of Justice Kelly. Accordingly, we respond to both in-kind.

Turning to the first [*Cort*] factor, plaintiffs are far-removed from the class for whose special benefit Congress enacted the Head Start Act. The purpose of this Act is to authorize the appropriation of funds for Project Head Start's "effective delivery of comprehensive health, educational, nutritional, social and other services to economically disadvantaged children and their families." 42 USC § 9831(a). Hence, the class for whose special benefit Congress passed the Head Start Act is the class of economically disadvantaged children and their families who need the specified services, which do not under any reasonable interpretation of the Act include employment services. Indeed, a Head Start agency would likely violate the Act if it employed the parent of Head Start child. See 42 USC § 9839(a)(3). Plaintiffs' assertion that "employees of Head Start agencies . . . are members of a class which is specially addressed are protected by the Act and regulations" is legally unsupported and legally unsupportable. . . . Congress plainly did not enact the Head Start Act in order to benefit Head Start employees.

As to the second Cort factor, the Court has found no indication that Congress intended the Act or its interpretive regulations to create a private right of action for employees who are terminated from Head Start agencies in [Page 502] a manner allegedly inconsistent with those rules. Plaintiffs admit that the Act lacks any explicit indication that Congress intended to create a cause of action for these employees, but argue that § 9849(b) of the Act "specifically negates any intent to deny such a cause of action." . . . Section 9849(b) concerns the application of the Civil Rights Act to any sexual discrimination that may occur in

connection with Head Start programs or activities. The last sentence states that the section "shall not be construed as affecting any other legal remedy that a person may have if such person is . . . denied employment in connection with any [Head Start] program, project, or activity . . . ."

At best, this sentence reveals a congressional unwillingness to interfere with any of the state and federal remedies that may be available to people who are denied jobs at Head Start agencies; it certainly does not reveal a congressional intent to create a private right of action under the Head Start Act for people who are fired from Head Start agencies. As plaintiffs surely realize, if courts inferred from Congress' failure to prohibit a private cause of action the congressional intent to create a private cause of action, courts would read into almost every federal statute an implied right of action. In the majority of instances, this curious interpretive method would undermine congressional intent rather than effectuate it. It also runs counter to the Supreme Court's demonstrated reluctance to infer private causes of action from federal statutes. . . .

Plaintiffs fare no better under the third Cort factor because implying a private right of action from the Head Start Act would do little or nothing to further the underlying purposes of the legislative scheme. . . .

* * *

We now come to the fourth Cort factor. Plaintiffs cast their claim as one "based on employee discharge in violation of federal policies . . . ." . . . For purposes of determining the existence of subject matter jurisdiction,

however, the Court considers the true nature of plaintiffs' action. . . . Although plaintiffs carefully avoid the phrase in their [Page 503] complaint, the essence of their claim is breach of an employment contract. Actions of this kind are traditionally relegated to state law. Thus the fourth Cort factor, along with the first three, strongly support the conclusion that the Head Start Act does not contain an implied private right of action for people who are terminated from Head Start agencies.[47]

Similarly, in *Johnson, supra,* the plaintiff alleged that the defendants had mismanaged a Head Start program in violation of federal regulations. The District Court for the Eastern District of Virginia held that Congress did not intend to provide a private cause of action to enforce the federal regulations:

> In this case, the applicable statutory scheme is set forth pursuant to the Head Start Act, 42 U.S.C. §§ 9831-9852a. Under the scheme, the Secretary of the Department of Health and Human Services is directed to "establish by regulation standards applicable to Head Start agencies, programs, and projects under this subchapter," including "minimum levels of overall accomplishment that a Head Start agency shall achieve." 42 U.S.C. § 9836a(a)(1) & (2). The Secretary is also

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[47] *Hodder, supra* at *11-*16 (citations omitted).

directed under this section to monitor the performance of every Head Start program and to take appropriate corrective action when a program fails to meet the performance standards established by the regulations. Specifically, the Act requires a full review of each grantee at least once during each three-year period, review of new grantees after the completion of the first year, follow up reviews and return visits to grantees that fail to meet the standards, and "other reviews as appropriate." 42 U.S.C. § 9836a(c). If the Secretary determines, on the basis of such a review, that a grantee fails to meet the standards described in § 9836a(a), the Secretary shall, *inter alia*, institute proceedings to terminate the Head Start grant unless the agency corrects the deficiency. 42 U.S.C. § 9836a(d).

[Page 504] All but three of the regulations cited in plaintiff's Second Amended Complaint were promulgated pursuant to the Head Start Act. See 45 C.F.R. § 1304.1. There is no provision in the Head Start Act, however, permitting a private citizen to enforce its provisions. Based on the alternative specific remedies mentioned above, Congress' intent is clear. The remedy for substandard performance by a Head Start program is an enforcement action by the Secretary of the Department of Health and Human Services, not by private litigants. For these reasons, the Court

> dismisses with prejudice plaintiff's claims alleging violations of statutory and regulatory provisions relating to the Head Start Act, for failure to state a claim upon which relief can be granted.[48]

We find *Hodder* and *Johnson* to be persuasive and similarly conclude, on the basis of the text and structure of the Head Start Act, that no private cause of action exists to enforce § 9839(a).

The act, of course, does not expressly provide for a private cause of action to enforce the disclosure requirement of § 9839(a). Thus, the question becomes whether the text of the act demonstrates an *implicit* intent to provide for a private cause of action.

Again, the stated purpose of the act is to promote school readiness by providing services to low-income children and their families. 42 USC 9831. The act does not contemplate any benefit to private corporations such as plaintiff; nor does it indicate any intent that such a private corporation may sue to enforce its provisions. Where the intended beneficiaries are specifically identified, we are loath to create a private means of seeking redress under the act for nonbeneficiaries.

More important, the act contains a comprehensive mechanism for ensuring agency

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[48] *Johnson, supra* at 336-337.

compliance with its provisions. We agree with the *Johnson* court that, far [Page 505] from demonstrating an intent to allow for a private cause of action, the act indicates that the *sole* remedy for a violation of § 9839(a) is an enforcement proceeding by the secretary of the HHS and the possible termination of Head Start agency status. See 42 USC 9836a.

In light of this clear indication of congressional intent, we are precluded from venturing beyond the bounds of the statutory text to divine support for the creation of a private claim to enforce § 9839(a). To do so would be to substitute our own judgment for that of Congress and thus to usurp legislative authority, something that we of course decline to do.[49]

IV. CONCLUSION

Because the Head Start Act does not provide for a private cause of action to enforce the disclosure requirement of § 9839(a), plaintiff has failed to state a cognizable claim. Accordingly, we reverse the judgment of the Court of Appeals and enter judgment in favor of defendant.

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[49] Again, contrary to the assertions of our dissenting colleagues, we do not miss any "important distinction" between the statutes at issue in *Touche Ross & Co* and *Alexander* and the statute at issue in this case, and this case does not represent the "opposite situation" of the situations present in those cases. *Post* at 516. Rather, just as the provisions at issue in *Touche Ross & Co* and *Alexander*, 42 USC 9839(a) calls for oversight by governmental agencies. *Post* at 516. Moreover, we wholly disagree with the dissent's contention that § 9839(a) "specifically confers an individual right on members of the public to conduct inspections of books and records." *Post* at 516. Rather, § 9839(a) imposes on Head Start agencies a disclosure requirement, and 42 USC 9836a explicitly provides a remedy for a violation of that requirement: corrective action to be initiated by the secretary.

Robert P. Young, Jr.

Clifford W. Taylor

Maura D. Corrigan

Stephen J. Markman

Weaver, J. (dissenting)

I concur in the majority opinion to the extent it holds that the state courts have concurrent jurisdiction in this matter.

I dissent from the majority holding that 42 USC 9839(a) of the federal Head Start Act does not permit plaintiff to seek disclosure of information relevant to the defendant's decision on competing bids for a contract. 42 USC 9839(a) provides, in pertinent part:

> Each [Head Start] agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.

For the reasons stated in Justice Kelly's dissent, I would hold that this statutory language does provide plaintiff a right to seek "reasonable" disclosure of records pertaining to contract bids submitted to a Head Start agency.

I write separately to elaborate on the majority's misreading of the effect of *Alexander v Sandoval*[1] on *Cort v Ash*.[2] Specifically, the majority is wrong to suggest that *Alexander* "appears to have abandoned the *Cort* inquiry altogether in favor of a completely textual analysis in determining whether a private remedy exists under a particular statute." *Ante* at 499.

Cort identified four factors relevant to determining whether a federal statute implied a private remedy where the statute did not expressly provide one. *Cort* held:

[Page 507]

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be

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[1] 532 US 275; 121 S Ct 1511; 149 L Ed 2d 517 ((2001).

[2] 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 ((1975).

inappropriate to infer a cause of action based solely on federal law?[3]

Unlike *Cort's* focus on whether a cause of action can be inferred from a statute, *Alexander* involved a distinct issue: whether a private cause of action could be inferred from a regulation that forbids conduct beyond that which was forbidden by the statute under which the regulation was promulgated.[4]

Because the conduct at issue in *Alexander* was prohibited by a regulation, but not by the statute pursuant to which the regulation was adopted, *Alexander* held that a cause of action alleging conduct in violation of the regulation could not be inferred from the statute. Given [Page 508] this situation, it was unnecessary for *Alexander* to delve deeply into the *Cort*

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[3] *Cort, supra* at 78.

[4] *Alexander* involved an interpretation of Title VI of the Civil Rights Act of 1964, which provides in § 601 that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity" covered by Title VI. 42 USC 2000d. Section 602 of the statute authorizes federal agencies to implement the provisions in § 601 by regulations.

The Department of Justice adopted regulations pursuant to § 602 that forbid funding recipients from adopting policies that created a disparate impact on individuals because of their race, color, or national origin. See 28 CFR 42.104(b)(2) (1999). Claiming that an English-only policy caused such disparate impacts, the plaintiffs in *Alexander* sued to enjoin the policy. While the *Alexander* Court assumed that the regulations were valid, the Court held that there was no private cause of action as a result of the policy because § 601 did not prohibit disparate impacts.

factors to resolve whether a cause of action could be inferred from the statute.

Though the majority may prefer that *Cort's* factors be abandoned and a "completely textual" approach be adopted, neither logic nor federal precedent supports its preference. First, it is absurd to advocate a "completely textual approach" where the need to examine whether a cause of action may be inferred from a statute is engendered by the *lack* of an expressly stated cause of action in the text of the statute. Further, the majority makes no attempt to explain how its "completely textual" approach differs from the *Cort* factors.

Second, while the majority correctly notes that not every federal case involving whether a private cause of action may be inferred from a statute has applied all the four *Cort* factors, it is an overstatement to suggest that the federal courts have "abandoned the *Cort* inquiry altogether." Even federal cases relied on by the majority employ a *Cort*-based analysis. For example in *Hodder v Schoharie Co Child Dev Council, Inc*, 1995 US Dist LEXIS 19049, *10 (ND NY, 1995), the court premised its analysis as follows:

> The Court may infer a private right of action from a federal statute that does not expressly create one only if the statute's language, structure, and legislative history reveal Congress' intent to create a private right of action. See *Thompson v. Thompson*, 484 U.S. 174, 179, 98 L. Ed. 2d 512, 108 S. Ct. 513 (1988); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 61 L. Ed. 2d 82, 99 S. Ct. 2479

(1979); *Cort v. Ash*, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). Courts normally try to divine Congressional intent by applying the four Cort factors: 1) whether plaintiffs belong to the class for whose special-benefit Congress passed the statute; 2) whether the indicia of legislative intent reveal a congressional purpose to provide a private cause of action; [Page 509] 3) whether implying a private cause of action is consistent with the underlying purposes of the legislative scheme; and 4) whether the plaintiff's cause of action concerns a subject that is traditionally relegated to state law. *Merrell Dow [Pharmaceuticals Inc v Thompson]*, 478 U.S. [804, 810-811; 106 S Ct 3229; 92 L Ed 2d 650 (1986)]; *Cort*, 422 U.S. at 78.

Hodder applied each factor from *Cort* to the provision of the Head Start Act at issue in that case.

That the majority misunderstands *Alexander's* effect is underscored by a recent United States Supreme Court decision, *Jackson v Birmingham Bd of Ed*, ___ US ___, ___; 125 S Ct 1497, 1506; 161 L Ed 2d 361, 373 (2005), where the Court emphasized that *Alexander's* holding is simply premised on the fact that the regulations at issue in *Alexander* extended protection beyond the limits of the statute at issue in *Alexander*. Describing the holding of *Alexander*, *Jackson* stated:

> [In *Alexander*] we rejected the contention that the private right of action to enforce intentional violations of Title VI

> encompassed suits to enforce the disparate-impact regulations. We did so because "it is clear . . . that the disparate-impact regulations do not simply apply § 601 -- since they indeed forbid conduct that § 601 permits -- and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations." [*Alexander*] at 285, 149 L. Ed. 2d 517, 121 S. Ct. 1511. See also *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 173, 128 L. Ed. 2d 119, 114 S. Ct. 1439 (1994) (A "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]").

In this case we must necessarily look beyond the text of the statute at issue to discern whether Congress intended that a private person be able to seek disclosure of documents from a Head Start agency. The text of the statute at issue in this case, 42 USC 9839(a), does not [Page 510] expressly create a private cause of action to enforce its provision regarding public access to information. Thus, it is necessary to look beyond the text to determine whether Congress intended to create a private cause of action. As recognized in *California v Sierra Club*, 451 US 287, 293; 101 S Ct 1775; 68 L Ed 2d 101 (1981), the four *Cort* factors

> present the relevant inquiries to pursue in answering the recurring question of implied causes of action. Cases subsequent to *Cort* have explained that the ultimate issue is whether Congress intended to

> create a private right of action . . . but the four factors specified in *Cort* remain the "criteria through which this intent could be discerned." [Citations omitted.]

Given the task at hand and the federal precedent by which we are bound, it is absurd to suggest that we must employ a "completely textual" approach. Any inquiry into whether a private cause of action may be inferred requires consideration of the intent of Congress and *Cort* is our guide. Regardless of the majority's apparent discomfort with *Cort's* factors and inferred causes of action, we are bound by federal law and five votes have not combined in any one case in the United States Supreme Court to declare *Cort* a dead letter.[5]

Elizabeth A. Weaver

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[5] In *Thompson v Thompson*, 484 US 174; 108 S Ct 513; 98 L Ed 2d 512 (1988), Justice Scalia (concurring in the judgment) expressed his vigorous disagreement with whether the Court should reaffirm *Cort* and whether it was appropriate to infer private causes of action from federal statutes that do not expressly provide them. Justice Scalia's view of *Cort* and inferred causes of action has not yet garnered the requisite five votes.

Kelly, J. (*dissenting*).

I agree with the majority that our state courts have jurisdiction over plaintiff's claim under the federal Head Start Act, 42 USC 9831 *et seq*. However, I disagree with its conclusion that the act, at 42 USC 9839(a), does not provide a private cause of [Page 511] action. The statutory language, the focus of the legislation, its history, and its purpose imply a congressional intent to allow private actions. Therefore, I would find such a right and affirm the decision of the Court of Appeals.

Defendant's Various Jurisdictional Challenges

Defendant raises a variety of jurisdictional arguments on appeal. It claims that primary jurisdiction must rest with the Department of Health and Human Services (HHS) because, otherwise, an "imbalance" would be created in the administration of the Head Start Act. This Court explained the doctrine of primary jurisdiction in *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185; 631 NW2d 733 (2001). It is based on the principle of separation of powers and is concerned with the respect appropriately shown to an agency's decisions made in the performance of regulatory duties. *Id.* at 196-197.

The primary jurisdiction doctrine underscores the notion that administrative agencies possess specialized and expert knowledge to address the matters they regulate. *Id.* at 198. The question of primary jurisdiction arises only with respect to matters that Congress has assigned to a governmental agency or administrative body. *Attorney General v Diamond*

Mortgage Co, 414 Mich 603, 613; 327 NW2d 805 (1982). This case does not concern such matters.

Moreover, resolution of this case does not require specialized knowledge. Instead, it involves a straight-forward question of statutory interpretation. This Court is well equipped to handle such questions because they do not require specialized or expert knowledge outside the scope of our general jurisdiction. Therefore, [Page 512] the primary jurisdiction doctrine simply does not apply to this case. *Id.*; *Travelers*, *supra* at 198-199.

Defendant complains that, under the *Chevron*[1] doctrine, the meaning that HHS has given to "reasonable public access" in various letters interpreting 42 USC 9839(a) should be definitive. *Chevron* directs that considerable weight be accorded an agency's construction of a statutory scheme. *Chevron*, *supra* at 844. But this applies only when the decision involves reconciling conflicting policies and requires more than ordinary knowledge of matters that the agency regulates. *Id.*

This case does not demand a detailed knowledge of the subject matter of the Head Start Act. Nor does it concern a complicated matter of interagency interaction or policy. It does not require detailed knowledge of the workings of the Head Start Act. Rather, it involves an issue of statutory construction. No special expertise being required, the *Chevron* doctrine does not apply. *Id.*

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[1] *Chevron USA Inc v Natural Resources Defense Council, Inc*, 467 US 837; 104 S Ct 2778; 81 L Ed 2d 694 (1984).

Defendant also argues that we lack jurisdiction because plaintiff failed to exhaust all its administrative remedies. But the United States Supreme Court has ruled that "where Congress has not clearly required exhaustion, sound judicial discretion governs." *McCarthy v Madigan*, 503 US 140, 144; 112 S Ct 1081; 117 L Ed 2d 291 (1992). 42 USC 9839(a) contains no exhaustion requirements and is silent regarding administrative remedies. Therefore, it is within our sound discretion to hear this case.

Given that none of the theories that defendant relies on to challenge this Court's jurisdiction applies here, it is appropriate for us to reach the merits of the case. And [Page 513] it is appropriate for us to decide whether Congress intended a private right of action in 42 USC 9839(a).

Whether a Private Cause of Action Exists Requires a Determination of Legislative Intent

Congress can create a private right of action in two ways. It can expressly provide for the right or it can imply it. *Cannon v Univ of Chicago*, 441 US 677, 717; 99 S Ct 1946; 60 L Ed 2d 560 (1979). Frequently, legislation does not clearly express whether a private right was intended. The growing volume of litigation and the complexity of federal legislation increase the need for careful scrutiny to ensure what Congress wanted. *Merrill Lynch, Pierce, Fenner & Smith, Inc v Curran*, 456 US 353, 377; 102 S Ct 1825; 72 L Ed 2d 182 (1982).

To assist us in undertaking that scrutiny, the United States Supreme Court articulated a four-part

test thirty years ago in *Cort v Ash*, 422 US 66; 95 S Ct 2080; 45 L Ed 2d 26 (1975). A court makes four inquiries: (1) whether the plaintiff is a member of the class for whose benefit the legislative body enacted the statute, (2) whether there is any indication that the legislative body intended to create or deny such a right of action, (3) whether inferring the right of action is consistent with the underlying scheme of the legislation, and (4) whether the cause of action is one traditionally relegated to state law so that it would be inappropriate to base the determination solely on federal law. *Id.* at 78. The key to this inquiry is determining the legislative intent in enacting the statute. *Merrill Lynch, supra* at 377-378.

In *Touche Ross & Co v Redington*,[2] the Court opined that the first three factors of *Cort* should be given greater weight than the fourth. The opinion states:

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> Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U.S., at 78—are ones traditionally relied upon in determining legislative intent. [*Id.* at 575-576.]

The language of the statute in question in *Touche Ross*[3] did not explicitly create a private remedy. Also, the legislative history gave no indication that Congress

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[2] 442 US 560; 99 S Ct 2479; 61 L Ed 2d 82 ((1979).

[3] 15 USC 78q(a).

intended one. The statute neither conferred rights on private parties nor proscribed conduct as unlawful. *Touche Ross, supra* at 569. It required that brokers keep certain documents for government inspection and focused on governmental rights of inspection. *Id.* at 569-570. Because the statute did not imply a private right of action, the Court found that none existed. *Id.* at 571.

The majority contends that, twenty-two years after *Touche Ross*, the United States Supreme Court abandoned the *Cort* analysis and switched to a completely textual analysis in *Alexander v Sandoval*, 532 US 275; 121 S Ct 1511; 149 L Ed 2d 517 (2001). I disagree. In *Alexander*, the Court followed the same reasoning as in *Touche Ross* and focused on the initial *Cort* factors.

As in *Touche Ross*, the *Alexander* Court stated that, to determine legislative intent, it was important to start with the language of the statute. *Id.* at 287-288. In that case, it needed to go no further in its inquiry. *Id.* at 288. The reason was that, as in *Touche Ross*, the statute under consideration[4] indicated that Congress intended not to create a private cause of action. *Alexander, supra* at 288-289.

That statute neither conferred rights on private parties nor proscribed conduct as unlawful. Instead, it [Page 515] empowered governmental agencies to enforce regulations. *Id.* at 289. The Court concluded that, by expressly providing one method of

[4] 42 USC 2000d-1.

enforcement, Congress signaled that it intended to preclude other methods.[5] *Id.* at 290.

Contrary to the majority's conclusion, a full reading of *Alexander* indicates that the Court did not abandon *Cort*. Instead, *Alexander* stated that the analysis in that case need not extend beyond the first two *Cort* factors because the statute indicated that Congress did not intend a private cause of action. The *Cort* factors remain a valid and important means of discerning legislative intent. The *Alexander* decision provides no basis to conclude the contrary.

Specific Analysis of 42 USC 9839

Despite espousing a textualist approach, the majority never deals with the actual language of 42 USC 9839(a). Instead, it focuses on tangentially related federal district court cases and the overall purpose of the Head Start Act.

Let us review the actual language in question. 42 USC 9839(a) provides in part:

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[5] The majority points out that 42 USC 9839(a) contains language like the statutory language that the Supreme Court analyzed in *Alexander*. *Ante* at 500 n 46. But the majority again misses the point. Unlike 42 USC 2000d-1, it contains a directive that does not concern the mere internal creation of rules. 42 USC 9839(a) contains language that is absent in 42 USC 2000d-1 (the statutory language analyzed in *Alexander*). 42 USC 9839(a) specifically mentions the "public" and "appropriate community groups . . . ." It allows the public and these groups to request public hearings and to seek access to books and records. 42 USC 9839(a).

> Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter [42 USC 9831 *et seq.*] and the [Page 516] objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. *Each agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency* or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible. Each such agency shall adopt for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to . . . (3) guard against personal or financial conflicts of interest . . . . [Emphasis added.]

This language indicates the intent of Congress to maintain open accountability in the use of Head Start funds. It explicitly provides a right of public access. After stating that "[e]ach agency shall also provide for reasonable public access to information," it spells out

particulars on how to meet this requirement, including holding public meetings.

The statute specifically confers an individual right on members of the public to conduct inspections of books and records. The opposite situation existed in both *Touche Ross* and *Alexander,* where the statutes lacked language creating such a right. They offered neither the general public nor any private individual access to anything. The oversight they called for was by governmental agencies. *Alexander, supra* at 288-289; *Touche Ross, supra* at 569-570. The majority simply misses this important distinction.[6]

[Page 517]

It relies on two federal district court cases, *Johnson v Quin Rivers Agency for Community Action, Inc,* 128 F Supp 2d 332 (ED Va, 2001), and *Hodder v Schoharie Co Child Dev Council, Inc,* 1995 US Dist LEXIS 19049 (ND NY, 1995). But *Johnson* and *Hodder* do not support the conclusion that no private cause of action exists and they are inapplicable to the case at hand.

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[6] The majority states that it "wholly disagree[s]" with the conclusion that 42 USC 9839(a) confers an individual right on a member of the public. It contends that 42 USC 9839(a) merely creates a disclosure requirement. *Ante* at 505 n 49. Again, the majority fails to analyze the actual language of the statute. 42 USC 9839(a) mandates public access, such as public hearings, at the request of "appropriate community groups . . . ." Only by allowing enforcement of this public inspection and access requirement can we effectuate Congress's specific goal of maintaining open accountability in the use of public funds. The majority simply ignores this clear congressional intent.

Neither dealt with 42 USC 9839(a). *Johnson* concerned claims of discrimination and substandard enforcement of Head Start regulations. *Johnson, supra* at 335. The Head Start provisions in question were 42 USC 9836a(a)(1) and (2). *Johnson, supra* at 336-337.

Hodder concerned claims of employees terminated from Head Start agencies. *Hodder, supra* at *16. It dealt with 42 USC 9849(b). *Hodder, supra* at *12. 42 USC 9839(a) was mentioned only in passing.

The only thing *Hodder* and *Johnson* have in common with this case is that both involve provisions of the Head Start Act. But the statutory language scrutinized in *Hodder* and *Johnson* makes no mention of public access as 42 USC 9839(a) does. Given that *Hodder* and *Johnson* do not deal with 42 USC 9839(a), they are of no assistance in our resolution of this case.

The majority also bases its decision on the general purpose of the Head Start Act. It assumes that the only purpose worth considering is the act's overarching goal of providing services to low-income children and their families. It ignores the congressional intent specifically written into 42 USC 9839(a).

[Page 518]

42 USC 9839(a) specifies Congress's goal of maintaining open accountability in the use of public funds and effectuates it by providing a right of public access to books and records. By ignoring these specific provisions, the majority has effectively substituted its judgment for that of Congress. In reducing public

oversight, it frustrates the paramount goals of the Head Start Act by facilitating the misuse of federal funds.

Application of the *Cort* factors to 42 USC 9839(a)

Given that the language of the statute does not contradict the existence of a private cause of action, it is appropriate to apply all the *Cort* factors. The first question is whether plaintiff is in the class for whose benefit Congress enacted 42 USC 9839(a). The statute indicates that Congress intended to grant access to the public at large. Plaintiff is a member of the public. Therefore, plaintiff is within the appropriate class. *Cort, supra* at 79.

The second question, whether there is any indication that Congress intended to create or to deny a private right of action, has already been discussed. The language of 42 USC 9839(a) indicates a specific intent to create such an action. There is no legislative history or other material contradicting this intent.

The third question is whether it is consistent with the underlying legislative scheme to infer a private right of action. *Cort, supra* at 78. As the majority states, the overall purpose of the Head Start Act is to promote school readiness. 42 USC 9831. As part of its plan to reach this goal, Congress expressed an intent to maintain open accountability in the use of public funds in 42 USC 9839(a). In the same section, to effectuate this intent, Congress provided the public with a right of access to books and records. Inferring a right of action [Page 519] to implement this right enforces that intent. Therefore, inferring a right of action is consistent with the legislative scheme.

Finally, there is no indication that this is a cause of action traditionally relegated to state law. And defendant makes no such argument. To the contrary, an action pursuant to 42 USC 9839(a) is the only means by which plaintiff could obtain the information it seeks. Therefore, the analysis of this factor, as with the other *Cort* factors, points to the need to recognize a private right of action under 42 USC 9839(a).

Where a Legal Right Exists, so Does a Legal Remedy

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws . . . ." *Marbury v Madison*, 5 US (1 Cranch) 137, 163; 2 L Ed 60 (1803). One of the fundamental tenets of the American legal system is that, where there is a legal right, there is also a legal remedy. *Id.* After it is determined that Congress intended a right of action, courts presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. *Franklin v Gwinnett Co Pub Schools*, 503 US 60, 66; 112 S Ct 1028; 117 L Ed 2d 208 (1992).

In this case, a private right of action exists under 42 USC 9839(a). Plaintiff sought the appropriate remedy of viewing the records of the bids submitted for office supplies and furniture. Defendant makes no persuasive argument that viewing this information would be unreasonable. This proposed remedy is specifically consistent with the language of 42 USC 9839(a), which allows for reasonable inspections of books and records. Therefore, Congress has not expressly indicated that this remedy is inappropriate. And the trial court did not err in granting it.

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I would affirm the decision of the Court of Appeals.

Marilyn Kelly

Michael F. Cavanagh

The Office Planning Group, Inc. v. Baraga-Houghton-Keweenaw Child Dev Bd

259 Mich App 279, 674 NW2d 686

November 4, 2003
Docket No(s) 245155.
Lower Court Docket No(s) LC No. 01-011593-CZ.
Disposition: Affirmed.

Counsel:
Tercha & Daavettila (by *Nicholas J. Daavettila*) for the plaintiff.

Johnson, Rosati, Labarge, Aseltyne & Field, P.C. (by *Marcia L. Howe*), for the defendant.

Judges:
Before: Meter, P.J., and Saad and Schuette, JJ.

Schuette, J.

Defendant Baraga-Houghton-Keweenaw Child Development Board appeals as of right an order granting in part and denying in part its motion for summary disposition under MCR 2.116(C)(10) and granting summary disposition to plaintiff Office Planning Group, Inc., under MCR 2.116(I)(2). We affirm.

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I. FACTS

This case arose when defendant denied plaintiff access to bids it accepted for the purchase of office furniture. Defendant is a private, non-profit organization that runs federal Head Start programs in the three counties it serves. Plaintiff is a private, for-profit corporation. In January 2001, defendant solicited bids for various office supplies and furnishings. Plaintiff submitted a bid for office furniture and cubicles on the original January 15 deadline. Defendant changed the deadline to January 29 after other vendors requested an extension, and plaintiff submitted a new bid before the extended deadline.

On January 29, 2001, defendant's building committee opened the bids at a public meeting. Plaintiff's representative, John Hamm, testified at the hearing on the motion for summary disposition that defendant's executive director, Rodney Liimatainen, informed him of the meeting but did not invite him to attend. Liimatainen confirmed none of the vendors that submitted bids attended the meeting. After the board opened the bids, Liimatainen informed Hamm that plaintiff's bid exceeded the lowest bid by $10,000. Defendant's board accepted the lowest bid at its meeting on February 14, 2001.

In letters dated February 5 and February 23, 2001, plaintiff and its counsel filed requests with defendant pursuant to the "FOIA"[1] for copies of all bids

[1] The parties agree plaintiff filed its request under Michigan's Freedom of Information Act, MCL 15.231 et seq.

for office furniture submitted to defendant. According to Hamm, plaintiff sought to ensure the winning bid contained the same items as [Page 282] plaintiff's bid. In a reply letter, defendant refused the request, stating it was a non-profit corporation and not subject to the FOIA.

Plaintiff filed the instant action and amended its complaint to include claims under the federal Freedom of Information Act, 5 USC 552, and "federal legislation which requires disclosure of information by parties supplying service under the so-called Head Start Program." Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), claiming no genuine issue existed with regard to any material fact and claiming defendant was not subject to the federal or state FOIA.

The trial court held an initial hearing on the motion and then requested the parties submit supplemental briefs addressing the application of 42 USC 9839, which sets administrative requirements for Head Start agencies. Among other things, the statute requires that agencies "provide for reasonable public access to information, including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible." 42 USC 9839(a). After receiving the supplemental briefs, the court scheduled an evidentiary hearing to clarify what it viewed as possible factual disputes. During this second hearing, the trial court ruled the federal and Michigan versions

of the FOIA did not apply to defendant. Plaintiff's FOIA claims are not at issue in this appeal.

On November 7, 2001, the trial court issued its opinion and order, denying defendant's motion for summary disposition with regard to the Head Start [Page 283] statute. The trial court concluded 42 USC 9839(a) required defendant to provide copies of the bids to plaintiff. The court held the purchase of office furniture required the use of funds for which defendant was responsible and the bids defendant accepted qualified as "books and records of the agency." Concerning what constituted reasonable access, the court noted certain types of access would not be reasonable, including a demand outside of working hours or a request that an agency create a record that does not exist. But the court concluded plaintiff's request was within reason:

> In the present situation, a denial by the Plaintiff of a written request to review specified, existing and readily accessible written bids is certainly not compliant with a requirement of providing reasonable public access. That would be true regardless of who made the request, but the case is even more compelling when the requesting party has a genuine, identifiable reason for the information sought, as did the Plaintiff.
>
> In summary, Defendant's denial of Plaintiff's request to review and obtain copies of the bids in question was in violation of the Federal requirement that Plaintiff provide for reasonable public access to information, including reasonable public access to books and records of the agency, involving the use of funds for which the Plaintiff is responsible.

The trial court granted plaintiff summary disposition pursuant to MCR 2.116(I)(2) and ordered defendant to provide "copies of all bids received by Defendant pursuant to its request for bids published in the *Daily Mining Gazette* and *L'Anse Sentinel* in accordance with Plaintiff's [sic, Defendant's] bid request dated January 4, 2001." The court also found defen- [Page 284] dant could require plaintiff to pay reasonable copying costs.[2]

Defendant now appeals the trial court's grant of summary disposition to plaintiff. The trial court denied defendant's motion to stay the proceedings pending this appeal, but we granted defendant's motion to stay the proceedings and its motion for immediate consideration of this appeal.

II. STANDARD OF REVIEW

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Additionally, statutory interpretation presents a question of law that we review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

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[2] In an extension of its earlier mix-up, the trial court stated *plaintiff* could require *defendant* to pay reasonable copying costs.

III. ANALYSIS

Defendant asserts the trial court erred in concluding 42 USC 9839(a) required defendant to disclose the bids plaintiff requested. We disagree.

The outcome of this case turns on the interpretation of a provision of the federal Head Start Act, 42 USC 9831 *et seq*. The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. *Heinz v Chicago Rd Investment Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996). If the statute's plain and ordinary meaning is clear, judicial construction is neither necessary nor permitted. *Id*. How- [Page 285] ever, if reasonable minds could differ regarding the statute's meaning, judicial construction is appropriate. *Rowell v Security Steel Processing Co*, 445 Mich 347, 351, 353; 518 NW2d 409 (1994).

Head Start programs "promote school readiness by enhancing the social and cognitive development of low-income children through the provision, to low-income children and their families, of health, educational, nutritional, social, and other services that are determined, based on family needs assessments, to be necessary." 42 USC 9831. According to regulations promulgated by the Department of Health and Human Services (HHS), a Head Start Agency is "a local public or *private non-profit* agency designated to operate a Head Start program by the responsible HHS official. . . ." 45 CFR 1301.2 (emphasis added). Defendant concedes it is subject to the Head Start Act because it contracts to provide services for HHS.

The Head Start Act requires agencies to follow certain administrative procedures, including the following:

> (a) Employment practices, nonpartisanship, staff accountability, public access to information, etc. Each Head Start agency shall observe standards of organization, management, and administration which will assure, so far as reasonably possible, that all program activities are conducted in a manner consistent with the purposes of this subchapter [42 USC 9831 *et seq.*] and the objective of providing assistance effectively, efficiently, and free of any taint of partisan political bias or personal or family favoritism. Each such agency shall establish or adopt rules to carry out this section, which shall include rules to assure full staff accountability in matters governed by law, regulations, or agency policy. *Each agency shall also provide for reasonable public access to information, including public hearings at the request of appropriate community groups* [Page 286] *and reasonable public access to books and records of the agency or other agencies engaged in program activities or operations involving the use of authority or funds for which it is responsible.* Each such agency shall adopt for itself and other agencies using funds or exercising authority for which it is responsible, rules designed to (1) establish specific standards governing salaries, salary increases, travel and per diem allowances, and other

> employee benefits; (2) assure that only persons capable of discharging their duties with competence and integrity are employed and that employees are promoted or advanced under impartial procedures calculated to improve agency performance and effectiveness; (3) guard against personal or financial conflicts of interest; and (4) define employee duties in an appropriate manner which will in any case preclude employees from participating, in connection with the performance of their duties, in any form of picketing, protest, or other direct action which is in violation of law. [42 USC 9839(a) (emphasis added).]

The parties dispute the meaning of the emphasized language and whether it requires defendant to grant plaintiff's request to view the bids for office furniture and cubicles.

Defendant first asserts 42 USC 9839(a) does not provide for a private cause of action. We disagree. Whether a statute provides a cause of action presents a question of statutory interpretation that we review de novo. *Pitsch v ESE Michigan, Inc*, 233 Mich App 578, 586; 593 NW2d 565 (1999), citing *Long v Chelsea Community Hosp*, 219 Mich App 578, 581-582; 557 NW2d 157 (1996).

This Court summarized the approach used to determine whether a private cause of action exists as follows:

> If the common law provides no right to relief, and the right to such relief is instead provided by statute, then [Page 287] plaintiffs have *no* private cause of action for enforcement of the right *unless:* (1) the statute expressly creates a private cause of action or (2) a cause of action can be inferred from the fact that the statute provides no adequate means of enforcement of its provisions. *Bell v League Life Ins Co,* 149 Mich App 481, 482-483; 387 NW2d 154 (1986). It follows that courts must dismiss a private cause of action under a statute creating a new right unless the statute expressly created the private cause of action or the cause of action may be inferred because the statute does not provide adequate means to enforce its provisions. *Forster v Delton School Dist,* 176 Mich App 582, 585; 440 NW2d 421 (1989). [*Long, supra,* at 583.]

Michigan courts have not addressed whether a private cause of action arises under 42 USC 9839(a). Neither have other state or federal courts. But two federal district courts have addressed whether other provisions of the Head Start Act provide a private cause of action, and each concluded they did not.

In *Johnson v Quin Rivers Agency for Community Action, Inc,* 128 F Supp 2d 332, 336 (ED Va, 2001), the plaintiff asserted numerous claims of mismanagement of a Head Start program, in violation of federal regulations. The district court, using an approach similar to that described in *Long, supra* at 583,

determined no private cause of action existed and dismissed the claims for failure to state a claim on which relief could be granted. *Johnson, supra* at 336. The court concluded:

> Under the scheme [the Head Start Act], the Secretary of the Department of Health and Human Services is directed to "establish by regulation standards applicable to Head Start agencies, programs, and projects under this subchapter," including "minimum levels of overall accomplishment that a Head Start agency shall achieve." 42 U.S.C § 9836a(a)(1) & (2). The Secretary is also directed under [Page 288] this section to monitor the performance of every Head Start program and to take appropriate corrective action when a program fails to meet the performance standards established by the regulations. Specifically, the Act requires a full review of each grantee at least once during each three-year period, review of new grantees after the completion of the first year, follow up reviews and return visits to grantees that fail to meet the standards, and "other reviews as appropriate." 42 U.S.C. § 9836a(c). If the Secretary determines, on the basis of such a review, that a grantee fails to meet the standards described in § 9836a(a), the Secretary shall, *inter alia*, institute proceedings to terminate the Head Start grant unless the agency corrects the deficiency. 42 U.S.C. § 9836a(d).

> All but three of the regulations cited in plaintiff's Second Amended Complaint were promulgated pursuant to the Head Start Act. See 45 C.F.R. § 1304.1. There is no provision in the Head Start Act, however, permitting a private citizen to enforce its provisions. Based on the alternative specific remedies mentioned above, Congress' intent is clear. The remedy for substandard performance by a Head Start program is an enforcement action by the Secretary of the Department of Health and Human Services, not by private litigants. [*Id.*]

Meanwhile, in *Hodder v Schoharie County Child Dev Council, Inc*, 1995 US Dist LEXIS 19049, 1 (ND NY, 1995), former employees of a private, non-profit organization that operated Head Start programs sued the organization for firing them in violation of the Head Start Act and its interpretive regulations. The court applied a four-part test to determine whether Congress intended to provide a private cause of action: "1) whether plaintiffs belong to the class for whose special benefit Congress passed the statute; 2) whether the indicia of legislative intent reveal a congressional purpose to provide a private cause of action; 3) whether implying a private cause of action [Page 289] is consistent with the underlying purposes of the legislative scheme; and 4) whether the plaintiff's cause of action concerns a subject that is traditionally relegated to state law." *Id.* at 10-11, citing *Merrell Dow Pharmaceuticals, Inc v Thompson*, 478 US 804, 810-811; 106 S Ct 3229; 92 L Ed 2d 650 (1986); *Cort v Ash*, 422 US 66, 78; 95 S Ct 2080; 45 L Ed 2d 26 (1975).

In light of these factors, the *Hodder* court decided no private cause of action existed. First, the court found the plaintiffs were "far-removed from the class for whose special benefit Congress enacted the Head Start Act," which benefits disadvantaged children and their families. *Hodder, supra* at 11. Second, the court found no indication Congress intended to create a private cause of action for employees terminated from Head Start agencies. *Id.* at 12. Third, the court concluded that inferring a private cause of action would do nothing to further the underlying purposes of the legislative scheme. *Id.* at 13-14. Finally, the court held actions for breach of an employment contract are traditionally relegated to state law. *Id.* at 16.

Returning to the case before us, neither 42 USC 9839(a) nor the Head Start Act generally creates an express private cause of action. However, we conclude the statute implies a private cause of action. In Michigan, a private cause of action may be inferred if a statute provides no adequate means of enforcing its provisions. *Long, supra* at 583. The statute in question, 42 [Page 290] USC 9839(a), requires Head Start agencies to provide reasonable public access to their books and records, but it does not provide any means of enforcing this specific provision. Although the Head Start Act requires agencies to open their books and records to the department secretary or the United States Comptroller General for audit and examination, 42 USC 9842, Congress specifically provided for *public* access to the books and records, not simply to the audits prepared by these other entities. Therefore, we conclude an implied private cause of action exists. Further, while the statute creates a federal cause of action, we conclude this Court shares concurrent jurisdiction to

decide this case because the Head Start Act does not provide for exclusive federal court jurisdiction. See *Gulf Offshore Co v Mobil Oil Corp*, 453 US 473, 478; 101 S Ct 2870; 69 L Ed 2d 784 (1981), on remand 628 SW2d 171 (Tex App, 1982), cert den 459 US 945.

Defendant next argues the trial court erred in granting plaintiff summary disposition and concluding the statute required defendant to reveal the bids to plaintiff. We disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests whether a claim has factual support. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We review the record in the same manner as the trial court to determine whether the moving party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998); *Michigan Ed Employees Mut Ins Co v Turow*, 242 Mich App 112, 114-115; 617 NW2d 725 (2000). Review is limited to the evidence before the trial court when it decided the motion. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003).

We could locate no authority, state or federal, on the issue defendant presents. However, our reading of the statute indicates the trial court did not err in concluding the statute required defendant to reveal the bids to plaintiff.

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Defendant contends the trial court's interpretation contradicts the plain meaning of the statute. First, defendant argues the statute applies only

to requests from "appropriate community groups." The statute states the agency must provide public access to information, "including public hearings at the request of appropriate community groups and reasonable public access to books and records of the agency. . . ." 42 USC 9839(a). Defendant contends "appropriate community groups" applies both to requests for public hearings and access to books and records and argues the use of "and" without a comma points to this interpretation. Plaintiff responds that the interjection of "public access" indicates the agency's books and records are available not only to these groups.

Although the provision is ambiguous in this regard, we find plaintiff's argument persuasive. The structure of the sentence indicates the agency must provide public hearings when "appropriate community groups" request them, but the agency's books and records are available for general, albeit reasonable, "public access." Interpreting the statute to allow only groups to access the information would render the "public access" language nugatory, and we avoid constructions that render any part of a statute surplusage. *Hoste v Shanty Creek Mgmt, Inc*, 459 Mich 561, 574; 592 NW2d 360 (1999).

Defendant next contends it provided plaintiff reasonable access to its records by providing copies of its audits and financial statements. Defendant did not suggest why providing access to the bids would be *unreasonable*. Presumably, defendant either views the process for producing the documents as too cumbersome to be reasonable or views the contents of the documents' as falling outside the scope of necessary [Page 292] disclosure. Regarding the first possibility,

defendant's executive director, Liimatainen, testified the bids were in the agency's records and could be produced on relatively short notice. So defendant seems to concede the production of the documents is not unreasonable from an administrative standpoint.

Concerning the second possibility—that is, the documents' content—defendant raises various arguments about why it should not have to reveal the information, but primarily argues the trial court's interpretation is too broad. Defendant notes the federal FOIA and the state FOIA include exceptions to their disclosure requirements and that courts have narrowed the scope of these acts even further. Defendant contends the trial court's interpretation improperly allows the public to conduct a fishing expedition in the records of private corporations simply because the corporations operate Head Start programs.

Yet, defendant fails to acknowledge that the statute contains limiting language. The statute requires disclosure only of books and records ". . . involving the use of authority or funds for which it [the agency] is responsible. . . ." 42 USC 9839(a). Also, defendant does not consider that the statute's lack of exemptions and further limiting language may reflect a policy decision by Congress not to limit the disclosure requirements for Head Start agencies. Defendant claims if Congress had wished to subject Head Start programs to FOIA-type disclosure requirements, it could have simply referenced the FOIA in the act. Conversely, Congress could have referenced the FOIA if it had wished to *limit* Head Start programs' disclosure obligations to those contained in the FOIA.

Defendant also argues the bidders did not have notice that the bids would be disclosed. But the stat-
[Page 293] ute itself provided that notice. The bidders knew, or should have known, they were submitting bids to a Head Start agency that was bound by the disclosure obligations of 42 USC 9839(a). Moreover, Liimatainen testified that if a member of the public came to his office and asked to see the bids, he would disclose them. Thus, defendant's declination to reveal the information appears to lie in its objection to the party requesting it, not to any characteristic of the information itself.

Yet defendant's objection to plaintiff's motivation for obtaining the information does not provide a proper basis for declining to disclose it. The statute does not state that defendant may choose to whom it wishes to disclose information. Instead, it requires "reasonable public access" to the information. 42 USC 9839(a).

In addition, the statute requires disclosure of "books and records of the agency . . . involving the use of authority or funds for which it is responsible." 42 USC 9839(a). Defendant has not persuasively asserted the bids do not meet these criteria. The trial court concluded defendant's purchase of furniture and equipment for its Head Start programs concerns the use of funds for which it is responsible. We agree. The statute requires disclosure of "books and records of the agency." While the trial court indicated that certain documents, such as personnel files, might not be subject to disclosure, the statute provides no basis for exempting the requested bids from disclosure. Additionally if the bids contained secret trade

information, as Liimatainen suggested, defendant could comply with the statute by redacting the documents to protect confidentiality. Defendant did not [Page 294] demonstrate redaction would be laborious or otherwise make plaintiff's request unreasonable.

Finally, defendant asserts the trial court erred in finding plaintiff had a genuine reason for seeking disclosure of the bids. Defendant contends plaintiff sought disclosure for purely commercial reasons: because it was "shocked" to learn it had not won the bid and wanted to gain information to allow it to improve future bids. We concur in the trial court's conclusion that plaintiff had a genuine reason for requesting the bids, that is, to ensure the bid process had been properly conducted, that the vendors were on equal footing before the agency, and that the agency properly spent its federal funds. Defendant claims that merely revealing its bid procedure provides accountability and allows the public to monitor the agency's expenditure of public funds, but we conclude that only by revealing the actual bids may the public know that the bid procedure was properly followed. Further, plaintiff's reason for requesting the bids is irrelevant. The statute does not limit the disclosure requirement. It requires defendant to provide reasonable public access to its books and records when they are requested for *any* reason.

Next, defendant asserts public policy counsels against interpreting the statute to require disclosure of the bids. Defendant argues the court's interpretation effectively transforms a private, non-profit organization into a public entity. Also, defendant contends the decision could have far-reaching effects, subjecting all

private organizations that receive federal funds to similar disclosure requirements.

While we do not deny these may be valid concerns, they represent policy considerations for the Legislature, not this Court, to weigh. In interpreting a stat- [Page 295] ute, we may not impose a construction based on a different policy decision than the one the Legislature has chosen. *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 752; 641 NW2d 567 (2002); see also *City of Lansing v Lansing Twp*, 356 Mich 641, 648; 97 NW2d 804 (1959) ("The duty of the Court is to interpret the statute as we find it. The wisdom of the provision in question in the form in which it was enacted is a matter of legislative responsibility with which courts may not interfere"). (citations omitted).

Additionally, defendant's arguments may be dismissed on other grounds. First, defendant's argument that the court's interpretation transformed a private, non-profit organization into a public entity is misplaced. HHS defines "Head Start Agency" to include private, non-profit organizations designated to operate Head Start programs. 45 CFR 1301.2. The parties do not dispute defendant meets this definition because it has been designated to operate a Head Start program in Baraga, Houghton, and Keweenaw counties. The statute at issue then requires each "Head Start agency" to provide reasonable public access to its books and records in regard to fiscal matters. 42 USC 9839(a). So, Congress and HHS— not the trial court—decided private, non-profit organizations must open their books to the public. The policy decisions have rested where they should, with the Legislature and administrative agencies.

Defendant also relies on *State Defender Union Employees v Legal Aid & Defender Ass'n*, 230 Mich App 426; 584 NW2d 359 (1998) to support its argument that a private, non-profit organization should not be required to open its books to the public. In that case, this Court ruled a private, nonprofit organization that was financed by both private and [Page 296] public funds and provided legal services to indigent persons was not required to disclose its financial reports and data to its employees. *Id.* at 432-433. The panel concluded, ". . . an otherwise private organization is not 'funded by or through state or local authority' merely because public monies paid in exchange for goods provided or services rendered comprise a certain percentage of the organization's revenue." *Id.* But the plaintiffs in that case sought disclosure under the FOIA. *Id.* at 427. The trial court in this case ruled defendant was not subject to FOIA disclosure requirements, and that ruling is not at issue on appeal. Therefore, the case is inapposite.

Next, defendant's argument that the trial court's decision could have far-ranging effect is unpersuasive because the statute is limited to Head Start agencies, as defined by 45 CFR 1301.2, 42 USC 9839(a), and our decision is to be narrowly applied to the facts of this case. The statute cannot be applied to other federally funded programs. Defendant also argues the interpretation could lead to disclosure of records pertaining to any third-party entity with which an agency contracts and disclosure by companies providing fleet vehicles for HHS. The duty of third parties to disclose their records is not at issue in this case. But the statute requires disclosure of the records and books ". . . of the agency *or other agencies engaged in*

program activities or operations . . . ." 42 USC 9839(a). Thus, the determination of who will be required to disclose information has properly rested with the policy-makers.

Finally, defendant asserts the trial court erred in failing to defer to the HHS's interpretation of the statute at issue. This Court may defer to administrative agency interpretations of statutes the agency is [Page 297] responsible to administer. *Adrian School Dist v Michigan Pub School Employees' Retirement Sys*, 458 Mich 326, 336; 582 NW2d 767 (1998). Generally, we defer to an agency interpretation unless that interpretation is clearly wrong. *Faircloth v Family Independence Agency*, 232 Mich App 391, 406; 591 NW2d 314 (1998).

HHS wrote two letters regarding this situation, in which it concluded that defendant could comply with the statute simply by providing copies of its procurement procedures and that defendant need not reveal specific information about the bids it received. Absent a more definitive ruling on this matter from the upper echelon of the agency staff or the agency secretary himself, we do not feel bound to follow the agency's interpretation.

Additionally, we conclude the agency interpretation is not entitled to deference because it is clearly wrong. 42 USC 9839(a) requires that Head Start agencies provide reasonable public access to their books and records dealing with their use of funds. As discussed, the statute does not limit the disclosure requirement to the agency's procedures without allowing access to the documents that reveal how the

agency put those procedures into effect. HHS did not indicate in its letter why that limit should be imposed.

Affirmed.

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF HOUGHTON

THE OFFICE PLANNING GROUP, INC.,
Plaintiff,

File No. 01-11593-CZ

v

BARAGA-HOUGHTON-KEWEENAW CHILD DEVELOPMENT BOARD, INC., a Michigan non-profit corporation,
Defendant.
_____/

ORDER FOLLOWING CONSIDERATION OF DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse in the City of Houghton, Houghton County, Michigan on the 7th Day of November, 2002.

Present: HONORABLE GARFIELD W. HOOD,
Chief Circuit Court Judge

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This case is before the Court upon Defendant's Motion for Summary Disposition, filed pursuant to MCR 2.116(C)(10). Initially, this Court was of the belief that there was no factual dispute between the parties and the Court heard oral argument on Defendant's Motion. Following oral argument, the Court requested

that the parties submit supplemental briefs. Upon consideration of those briefs, it became apparent that the parties differed on certain facts which the Court considered to be critical and material. Therefore, a hearing was conducted to permit the Court to receive any testimony which the parties wished to present on the disputed, material issues of fact.

The Plaintiff in this action is a Michigan, for profit corporation which maintains an office in Houghton County, Michigan, staffed by Jack Hamm, who is the company's branch manager and a Houghton County resident. Defendant is a Michigan non-profit corporation which maintains its principal office in Houghton County, Michigan.

In summary, during January of 2001, Defendant advertised for bids for office furniture and the Plaintiff, among others, submitted a bid. Ultimately, the bids were opened at a public meeting however members of the public were not given the opportunity to review either the accepted, or the unaccepted, bids.

On February 5, 2001, the Plaintiff, through Mr. Hamm, made a formal request under the Michigan Freedom of Information Act and in accordance with "appropriate Federal legislation" for the production of all of the bids for the Plaintiff's review. The Defendant denied that it had a legal responsibility to make such a disclosure. This litigation, in which the Plaintiff is seeking the Order of the Court compelling the release and disclosure of such bids, ensued.

Defendant's Motion for Summary Disposition, as to Plaintiff's claim made pursuant to the Michigan

Freedom of Information Act, is granted. The FOIA requires that a "public body" must disclose all public records that are not specifically exempt under the Act. To the extent applicable to this case, the FOIA provides that a "public body" is

> "Any other body which is created by State or local authority or which is primarily funded by or through State or local authority."

The Defendant receives the funds with which it operates almost entirely from governments which purchase services from it. In Kubick v. Child and Family Services of Michigan, Inc., 171 Mich App 304 (1988), the Court held that when governmental contributions to an entity are less than half of the organization's total funding, the organization is not "primarily funded by or through State or local authority."

In State Defender Union Employees, UAW Local 412-Unit 64 v Legal Aid and Defender Association of Detroit, 230 Mich App 426 (1998), the Court held that "funded", as used in the statute, is to be construed to mean the receipt of a governmental grant or subsidy, and certainly something other than an exchange of services or goods for money, even if the payer is a governmental unit. Thus, the Defendant is not subject to the provisions of the Michigan Freedom of Information Act.

Further, in Kubick, supra, the Court suggested that the Federal Freedom of Information Act was also inapplicable to the issue in that under the Act, a private

organization is not a governmental agency for purposes of the Act, reasoning equally applicable to the private, non-profit Defendant in this case.

Accordingly, Defendant's Motion for Summary Disposition is granted as to Plaintiff's claim to the extent that that claim is founded upon the Federal Freedom of Information Act.

Plaintiff also sought the withheld bid information "...under the Federal legislation requiring that providers of service under the Head Start program provide information upon request."

Plaintiff specifically refers to the Administrative Requirement Standards set forth at 42 USC sec. 9839 which, to the extent applicable to the present dispute, provides,

> "Each agency shall also provide for reasonable public access to information, including *** reasonable public access to books and records of the agency *** involving the use of *** funds for which it is responsible."

Working backward, the purchase of office furniture would certainly be included within the phrasse "...the use of *** funds for which it is responsible." The act of buying office furniture, using Head Start monies, would unquestionably require the use of money within its custody and for which it is responsible.

The phrase, "...books and records of the agency..." is a generic, catch all description, not uncommonly seen in State and Federal Legislation, which is essentially all inclusive. It would certainly include written bids and supplementary materials within the agency's custody.

Finally, what is "...reasonable public access..." to an agency's books and records?

A demand that information be provided outside of working hours would not be reasonable. A demand that an agency exhaustively search for something that the requesting party cannot properly identify would not be reasonable. As recognized by the Michigan Freedom of Information Act, it would likely not be reasonable to expect an agency to create a record, such as a compilation or summary, when no such record exists. And it may well not be reasonable to demand that an employee's personnel file or disciplinary record be disclosed.

In the present situation, a denial by the Plaintiff of a written request to review specified, existing and readily accessible written bids is certainly not compliant with a requirement of providing reasonable public access. That would be true regardless of who made the request, but the case is even more compelling when the requesting party has a genuine, identifiable reason for the information sought, as did the Plaintiff.

In summary, Defendant's denial of Plaintiff's request to review and obtain copies of the bids in question was in violation of the Federal requirement that Plaintiff provide for reasonable public access to

information, including reasonable public access to books and records of the agency, involving the use of funds for which the Plaintiff is responsible.

Accordingly, Defendant's Motion for Summary Disposition is denied to the extent that it is based upon Plaintiff's reliance upon 42 USC sec. 9839. Furthermore, pursuant to MCR 2.116(I)(2), this Court finds that Plaintiff is entitled to Summary Disposition on its claim, and the same is hereby granted.

Defendant shall provide Plaintiff with copies of all bids received by Defendant pursuant to its request for bids published in the Daily Mining Gazette and L'anse Sentinel in accordance with Plaintiff's bid request dated January 4, 2001. Plaintiff may require Defendant to pay the reasonable costs associated with copying the same.

IT IS SO ORDERED.

GARFIELD W. HOOD (P15101)
Chief Circuit Judge